(25,553)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 723.

D. N. FINK AND O. J. FLEMING, AS TRUSTEES, &c., PLAINTIFFS IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 Filed in Supreme Court of Oklahoma, Oct. 9, 1916. William M. Franklin, Clerk.

* * * * * * *

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the Board of County Commissioners of Muskogee County, Oklahoma, and W. H. Wainright, Treasurer of Muskogee County, Oklahoma, and their successors in office; and the County Attorney of Muskogee County, Oklahoma, and the Attorney General of the State of Oklahoma, their attorneys of record in the above entitled cause, Greeting:

You are hereby cited and admonished to be an- appear in the United States Supreme Court, to be held at the City of Washington, in the District of Columbia, thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Oklahoma, wherein D. N. Fink and O. J. Fleming, Trustees, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said D. N. Fink and O. J. Fleming, Trustees, plaintiffs in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Mathew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this the 20 day of September, A. D. 1916.

J. F. SHARP,
Vice Chief Justice of the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma,
County of Muskogee, ss:

I, Joseph I. Cromwell, of lawful age, being first duly sworn on oath state, that I served the above and foregoing citation on the County Treasurer of Muskogee County, Oklahoma, and on the Board of County Commissioners of Muskogee County, Oklahoma, on the 3rd day of October, A. D. 1916, by delivering to the Chairman of said Board of County Commissioners, and to the County Treasurer of said County, in person, a true, perfect and complete copy of said citation.

JOSEPH I. CROMWELL.

Subscribed and sworn to before me this 3rd day of October, A. D. 1916.

[SEAL.] E. P. THOMPSON,
Notary Public.

My commission expires July 28, 1920.

We, the undersigned Attorney General of the State of Oklahoma, and County Attorney of Muskogee County, Oklahoma, hereby acknowledge service of the above citation to have been made on us this 20th day of September. 1916.

S. P. FREELING,
Attorney General.
FRED P. MANSON,
County Attorney.

ELMER COON,
Chairman Board Co. Commissioners.
CONNELL ROGERS,
Co. Treas.

2 Filed in Supreme Court of Oklahoma, Oct. 9, 1916. William M. Franklin, Clerk.

* * * * * * * *

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Board of County Commissioners of Muskogee County, Oklahoma, and W. H. Wainright, Treasurer of Muskogee County, Oklahoma, and their successors in office; and the County Attorney of Muskogee County, Oklahoma, and the Attorney General of the State of Oklahoma, their attorneys of record in the above entitled cause, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, thirty (30) days from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the clerk's office of the Supreme Court of the State of Oklahoma from a final judgment and decree signed, filed, and entered on the eighth day of February, A. D. 1916, in that certain suit, being No. 5481, wherein you are plaintiffs in error and D. N. Fink and O. J. Fleming, Trustees, for Lots in Cromwell Heights Addition, to Muskogee, Oklahoma, are defendants in error, to show cause, if any there be, why the said judgment and decree rendered against the said defendants in error in the above entitled cause, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Mathew J. Kane, Chief Justice of the Su-

preme Court of the State of Oklahoma, this the 20 day of September, A. D. 1916.

J. F. SHARP,
Vice Chief Justice of the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma,
County of Muskogee, ss:

I, Joseph I. Cromwell, of lawful age, being first duly sworn on oath, state, that I served the above and foregoing citation on the County Treasurer of Muskogee County, Oklahoma, and on the Board of County Commissioners of Muskogee County, Oklahoma, on the 3rd day of October, A. D. 1916, by delivering to the Chairman of said Board of County Commissioners and to the County Treasurer of said County, a true, perfect and complete copy of said citation, in person.

JOSEPH I. CROMWELL.

Subscribed and sworn to before me this 3rd day of October, A. D. 1916.

[SEAL.] E. P. THOMPSON,
Notary Public.

My commission expires July 28, 1920.

We, the undersigned Attorney General of the State of Oklahoma, and County Attorney of Muskogee County, Oklahoma, hereby acknowledge service of the above citation to have been made on us this 20th day of September, 1916.

S. P. FREELING,
Attorney General.
FRED P. MANSON,
County Attorney.

ELMER COON,
Chairman Board of Commissioners.
CONNELL ROGERS,
Co. Treas.

3 Filed in Supreme Court of Oklahoma, Sep. 20, 1916. William M. Franklin, Clerk.

* * * * * * *

Petition for Writ of Error in the Above Cause.

To the Honorable Judges of the Supreme Court of the State of Oklahoma:

The above named defendants in error feeling aggrieved by the judgment rendered and entered by this court in the above entitled cause on the eighth day of February, A. D. 1916, and the

order of this court denying the petition of the defendants in error for a rehearing in said cause, do hereby petition this Honorable Court to allow and grant them a writ of error from said judgment and order, from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma for the reasons set forth in the assignment of errors filed herewith, and they pray that such writ of error be allowed and that citation be issued as provided by law, and that a transcript of the record and proceedings upon which said judgment and order was based, duly authenticated together with such writ and assignment of errors be sent to the United States Supreme Court, sitting at Washington D. C. under the rules of such court in such cases made and provided. And your petitioners further pray that the proper order relating to the required security to be required of them be made, and for all proper orders in the premises.

D. N. FINK AND
O. J. FLEMING,
Trustees, Defendants in Error,
By W. O. CROMWELL,
GEORGE W. BUCKNER,
Their Solicitors and Counsel.

Upon a consideration of the above petition and the assignment of errors filed therewith, it is hereby order-d that said writ of error be and the same is hereby allowed, and the execution of the judgment of this court is stayed pending the disposition of the proceedings in error upon giving the bond required by the order of this court.

J. F. SHARP,
Vice Chief Justice of the Supreme Court of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:
WM. M. FRANKLIN, *Clerk.*

[Endorsed:] No. 5481. Board of County Com'r's of Muskogee County et al., Plaintiffs in Error, vs. D. N. Fink & O. J. Fleming, Trustees, Defendants in Error. Petition for Writ of Error and Order Allowing same. Filed in Supreme Court of Oklahoma. Sep. 20, 1916. William M. Franklin, Clerk.

4 Filed in Supreme Court of Oklahoma, Sep. 20, 1916.
William M. Franklin, Clerk.

* * * * * * *

Assignment of Errors.

Now comes the defendants in error in the above entitled cause and file the following assignment of errors upon which they will

rely upon their prosecution of the writ of error and appeal in the above entitled cause from the judgment of this Honorable Court rendered and entered in said cause on the 8th day of February, A. D. 1916.

First.

The Supreme Court of the state of Oklahoma, erred, in reversing and overruling the judgment of the District Court of Muskogee County Oklahoma, which judgment overruled the demurrer interposed by the plaintiffs in error in this court, to the original petition filed in this cause in said court by the defendants in error in this court; and erred in holding that the land in controversy is subject to taxation by the state of Oklahoma.

Statement.

The sole question of law presented to and decided by the Supreme Court of Oklahoma in this cause, is a federal question, arising under the laws and constitution of the United States, wherein is drawn in question the validity of a treaty, statute, and an authority of and exercised under the United States, and the decision is against their validity; and, wherein is drawn in question the validity of an authority exercised under the state of Oklahoma, on the ground that such authority is repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of its validity; and, wherein is involved the right, title, privilege, immunity and exemption of defendants in error's property from taxation by the state of Oklahoma, which immunity, exemption, privilege and right was especially set up and claimed by the defendants in error in the said Supreme Court under and by virtue of the constitution, statutes, Treaties, contracts and laws of the United States, and the decision of said court was against the right, privilege, immunity and exemption.

The said judgment and decision of the Supreme Court of Oklahoma specifically involves the authority of the state of Oklahoma acting through its officers to impose and collect taxes on the homestead of Eliza J. Murphy, a Creek Indian allottee and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians domiciled in the state of Oklahoma, which homestead was by the United States deeded to Eliza J. Murphy on the 20th day of April, 1903, and the deed was approved by the Secretary of the Interior of the United States on the 26th day of May, 1903, and which deed pursuant to agreement between the United States and the Tribe or Nation of Indians of which the grantee therein is a member, and pursuant to acts of the Congress of the United States,
5 contained the provision, that said homestead shall be nontaxable and inalienable and free from any incumberance whatever for twenty-one years from the date of the deed to said homestead.

It being the contention of the plaintiffs in error in the Supreme

Court of Oklahoma, that the state of Oklahoma had the right to tax this homestead during the period it was exempted from taxation by the treaties, agreements and laws of the United States set forth in said deed and this right they claim under the terms of the Act of Congress of May 27, 1908; and it being the contention of the defendants in error in said court, that the said act of Congress gives no such authority, but that if it did, that then, any such subsequent act of the Congress of the United States, permitting or attempting to tax the land described in the homestead deed prior to the expiration of twenty-one years from its date, is an act which impairs the obligation of the contract evidenced by such deed, and is unconstitutional and void for conflict with the fifth amendment to the constitution of the United States.

Second.

The Supreme Court of the state of Oklahoma erred in holding that the act of Congress of May, 27th, 1908, granted the right to Eliza J. Murphy to alienate her homestead upon condition that she first waive and surrender the exemption of the homestead from taxation.

Third.

The Supreme Court of the state of Oklahoma erred in holding, that its construction of the Act of Congress of May 27th, 1908, as set forth in the second assignment of error herein, renders the homestead of Eliza J. Murphy subject to taxation by the authorities of the state of Oklahoma, and that under such construction said Act of Congress is constitutional, and constitutionally destroys the previously vested exemption of the land from taxation; because if the Act of May 27th, 1908, has the effect to reach back and destroy vested property rights by or through any means whatsoever, whether the means be those of extortion, coercion or reprisal they would be equally obnoxious to the constitution of the United States for that instrument does and will protect the contract between the United States and the Indian homesteader, and the vested property rights thereunder.

Fourth.

The Supreme Court of the state of Oklahoma erred in holding, that it and its officers were not precluded and estop-ed from asserting the right of taxation of the land embraced in the homestead of Eliza J. Murphy.

Fifth.

The Supreme Court of the state of Oklahoma erred in holding that it was the intent of the Congress of the United States at the time the contract of tax exemption was made with the Indian, to

provide that in the event of a sale of the exempted land that it should then become subject to taxation, and that this concealed intent not expressed or discussed at the time of making the contract, and although contrary to the expressed s-irit and purpose of the exemption, confers the power on Congress by later Act to express this intent and force it into the provisions and conditions of the prior executed contract.

Sixth.

The Supreme Court of the State of Oklahoma erred in holding that the grantees of the Indian homesteader did not take the land with all the rights, privileges, incidents and exemptions thereunto belonging or in anywise appertaining.

Seventh.

The Supreme Court of the state of Oklahoma erred in overruling the petition of the defendants in error in the above entitled
6 cause to vacate its judgment and decision rendered in this cause and to grant the defendants in error a rehearing in said cause.

Wherefore, for the error-s apparent in the judgment and proceedings of the Supreme Court of the State of Oklahoma in this cause, the said D. N. Fink and O. J. Fleming Trustees, pray that said judgment be reversed, and that said Supreme Court be ordered to vacate its judgment in this cause, and to enter a judgment affirming the judgment of the District Court of Muskogee County Oklahoma in this cause, and that it be directed to issue its mandate to said court directing that final judgment be entered in this cause making the injunction granted in the cause perpetual, and for costs and all proper relief.

D. N. FINK AND
O. J. FLEMING,
Trustees,
By W. O. CROMWELL, AND
GEORGE W. BUCKNER,
Their Counsel and Solicitors.

[Endorsed:] No. 5481. B'd of County Com'r's of Muskogee County et al., Pl'ffs in Error, vs. D. N. Fink & O. J. Fleming, Trustees, Def'ts in Error. Assignment- of Errors.

7 Filed in Supreme Court of Oklahoma. Sep. 20, 1916. William M. Franklin, Clerk.

* * * * * * *

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the state of Oklahoma, before you, at the January Term, 1916, thereof, between the Board of County Commissioners, of Muskogee County, Oklahoma, and W. H. Wainright as County Treasurer of Muskogee County, and their successors in office, as plaintiffs in error, and against D. N. Fink and O. J. Fleming, as Trustees for Lots in Cromwell Heights Addition, to Muskogee Oklahoma, as their interest appears, as defendants in error, a manifest error hath happened, to the great damage of the said D. N. Fink and O. J. Fleming as Trustees aforesaid, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington D. C., and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 19 day of October, 1916, to the end that the record and proceedings afore-
8 said being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 20 day of September, in the year of Our Lord one thousand nine hundred sixteen.

[Seal of the State of Oklahoma, Western District of Oklahoma.]

ARNOLD C. DOEDE,
Clerk of the Dist. Court of the United States for the Western District of Oklahoma.

Allowed by—
J. F. SHARP,
Vice Chief Justice of the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

In obedience to the command of the within Writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled cause with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the Supreme Court of the state of Oklahoma, this 9th day of October A. D. 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

9 Filed in Supreme Court of Oklahoma. Sep. 20, 1916.
William M. Franklin, Clerk.

* * * * * * *

Petition for an Appeal in the Above Cause.

To the Honorable judges of the Supreme Court of the State of Oklahoma, the above named defendants in error feeling aggrieved by the judgment and decree rendered and entered by this court in the above entitled cause on the eighth day of February, A. D. 1916, and the order of this court denying the petition of the defendants in error for a rehearing in said cause, do hereby appeal from said judgment, decree and order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record and proceedings upon which said judgment, decree and order was based, duly authenticated be sent to the United States Supreme Court, sitting at Washington D. C. under the rules of such court in such cases made and provided. And your petitioners further pray that the proper order relating to the required security to be required of them be made, and for all proper orders in the premises.

D. N. FINK AND
O. J. FLEMING,
Trustees, Defendant in Error,
By W. O. CROMWELL AND
GEORGE W. BUCKNER,
Their Solicitors and Counsel.

[Endorsed:] No. 5481. Board of County Com'r's of Muskogee Co. et al., Pl'ffs in Error, vs. D. N. Fink & O. J. Fleming, Trustees, Def'ts in Error. Petition for an Appeal. Filed in Supreme Court of Oklahoma. Sep. 20, 1916. William M. Franklin, Clerk.

10–16 Filed in Supreme Court of Oklahoma. Sep. 20, 1916. William M. Franklin, Clerk.

* * * * * * *

Order Allowing Appeal.

Now on this 20 day of September A. D. 1916, on motion of W. O. Cromwell and Geo. W. Buckner, Esqs., solicitors and counsel for complainants, it is hereby ordered that an appeal to the Supreme Court of the United States from the judgment and decree heretofore filed and entered in this cause, be, and the same is hereby allowed, and it is ordered that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings in this cause be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of $10,000.00 in case the complainants desire to supersede the judgment of this court in this cause which bond shall also act as a bond for costs and damages on appeal; in case the complainants do not desire to supersede the judgment of this court the appeal bond shall be fixed in the sum of $10,000.00.

By the Court.

J. F. SHARP,
Vice Chief Justice.

[Seal Supreme Court, State of Oklahoma.]

Attest:
WM. M. FRANKLIN, *Clerk.*

* * * * * * *

17 In the District Court of Muskogee County, State of Oklahoma.

No. 2327.

D. N. FINK, O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition, Muskogee, Okla., as Their Interest Appears, Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Okla., and W. H. Wainright, as County Treasurer of Muskogee County, Okla., and Their Successors in Office, Defendants.

Petition.

Comes now D. N. Fink and O. J. Fleming, plaintiffs, and state that they are trustees for W. O. Cromwell and J. I. Cromwell and numerous persons holding contracts for lots in Cromwell Heights addition to Muskogee and that they bring this suit as such trustees and for the use and benefit of said parties as their interest appears

as shown by certain deed of trust now of file in the office of the Register of Deeds of Muskogee County in said state and the several contracts held by divers persons for lots in the addition aforesaid and for cause of action herein against said defendants says:

That the said defendant W. H. Wainright, is the duly elected, qualified and acting County Treasurer of said county; That at all times hereinafter mentioned W. E. Looper was duly elected, qualified and acting County Clerk of said County.

18 Plaintiffs further allege that on or about the 1st day of March, 1911, that they owned and possessed within the city of Muskogee in said county and state certain real estate and personal properties. That at such time one L. F. Kipp was then and there claiming to be the assessor for taxation purposes of the city of Muskogee in said County and State.

Plaintiffs allege that the said L. F. Kipp was not an assessor of said city of Muskogee and had no authority or jurisdiction to act as such, and that his action as such was a mere pretense and assumption of authority without sanction of law or office:

The said plaintiffs allege that about the 1st day of March, 1911, and thereafter the said L. F. Kipp assumed and pretended to act as such assessor, and also assumed and pretended to act as such assessor through and by virtue of certain persons, by him designated and described as deputies or as deputy assessors. Plaintiffs allege that such deputies or deputy assessors were without authority or sanction, either of law or office, and that their acts and conduct as such pretended deputy assessors were void.

Plaintiffs allege that the several descriptions of the respective properties the subject of this action and for which the said plaintiffs are taxed is hereto separately attached and marked Ex-

19 hibits 1 to 189 and opposite each respective piece and parcel of said property is set out the actual, fair cash value of said parcel, estimated at a price it would bring at a fair, voluntary sale in the name of the owner on the 1st day of March, 1911, and also the valuations thereof placed on the said parcels by the County Clerk of the said county, after County Equalization, as hereinafter more specifically set out, and also in separate columns the separate valuation as fixed by the County Clerk of said county in making up his tax roll of said County, commonly called the state Equalization Valuation, also in separate column the mortgage incumbrance on each item of said property and also in a separate column the fair cash value at said time, estimate- at the price it would bring at a voluntary sale by the owner, which plaintiffs allege to be the measure of plaintiffs' ad valorem tax on account of the ownership thereof, if any of said pretended taxes be adjudged legal.

Said plaintiffs further allege that on or about the 1st day of June, 1911, the said County Clerk made up a list commonly called the tax roll from the said pretended valuations so as aforesaid furnished him by the said pretended assessor, and pretended deputies thereof, and such other persons throughout the said County as pretended to be township, town or city assessors in their respective municipalities,

and said list included these said plaintiffs and their said prop-
20 erties and the valuations so as aforesaid fixed and reported by the respective authorities in said County.

And the said County Clerk therefrom made a summary and abstract of the valuations of the various kinds of real and personal property so listed and valued in the said county, dividing said summary into forty-five different items of kinds, and included within the aggregate of said items properties of these plaintiffs and the amounts and values so ascertained for each of said different items and forwarded the said abstract to the State Auditor of said State, showing by the said abstract that the said pretended assessor and deputies thereof in the said County had fixed the values of all the properties in the said County on the 1st day of March, 1911, at $18,900.00 Dollars. That a copy of said instrument is hereto attached, made a part hereof and marked Exhibit 1 to 189.

That thereafter, after such abstract was submitted by the State Auditor to the State Board of Equalization along with other abstracts from the different counties of the State so similarly obtained, and the said State Board of Equalization made certain orders relating thereto, a copy of which orders relating to Muskogee county is hereto attached, made a part hereof and marked Exhibit A.

Thereafter and about the 31st day of July, 1911, the State Auditor returned said abstract to the said County Clerk of said Musko-
21 gee County showing certain changes in the aggregate valuation of certain of said kinds of properties in the said County, which changes are shown in the last column of said abstract, and which column is marked Exhibit B of said Exhibit 1 to 189.

That said County Clerk of said county, misconstruing the duties of his office estimated the said aggregate valuations of the said kinds of properties shown in Exhibit B to be the proper valuation of all of said kind of property in the said county and proceeded to divide up the said aggregate valuation among the designated taxables of said County, including these said plaintiffs pro rata in proportion to their pretended equalized, assessed valuation of their property bore to the gross amount of said kinds of properties in said county, or as is commonly expressed or understood raised the pretended valuation of plaintiffs' said properties on a fixed percentage basis, being the same percentage that the said respective kinds of property within the county was changed in the aggregate by the said State Board of Equalization, and thereafter extended against the said plaintiffs' specified property upon the tax roll of said county, the said fictitious valuation, so ascertained, and also extended thereupon a pretended tax levy based upon said fictitious valuation, said levy or rate of taxation being the one determined by the constituted authorities therefor.

22 That under the treaties between the United States and the Indians representing the Creek Nation and the Laws of the United States said land and several lots are exempt from taxation by reason of the fact that said land and lots are a part of the homestead of the allottee Eliza J. Murphy.

And plaintiffs allege that the said acts of the State Board of Equalization were without authority of law and void.

Plaintiffs further allege that the said last action of the said county clerk in so extending such increased valuation against plaintiffs' properties in said county for taxation, was without authority of law and void, and that plaintiffs not notified of said voice, and was a mere attempt at arbitrary reassessment or revaluation by him of plaintiffs' said properties in said county; and plaintiffs allege that such recalculation, so extended by the county clerk imposed upon said plaintiffs a pretended increase of 50% per cent of the pretended taxes theretofore, as herein aforesaid fixed on said plaintiffs.

The said plaintiffs further allege that the said defendant W. H. Wainright is the duly, elected qualified and acting county treasurer of said county, and was and is at all times hereinafter mentioned.

That said treasurer is charged with the duty of collectin- the
23 properly determined taxes of said County, and that the said county clerk has delivered the said tax roll so made up as aforesaid to the said county treasurer, and the county treasurer conceives it his duty to collect from the said plaintiffs on account of said plaintiffs' said properties, and the taxes and charges so extended against the said properties, plaintiffs by the said county clerk, for and on account of the ownership of said properties as aforesaid. Said pretended taxes and charges being based upon the valuation of the said properties, so as aforesaid fixed by the county clerk of said county, calculating hereupon the rate of taxation as fixed and determined by the various authorities of the State constituted for that purpose.

And the plaintiffs allege that the said action of the said county treasurer is without authority of law or office and is void, and that the demand of such county treasurer, for the reasons herein set out if excessive, unjust and unlawful:

Said plaintiffs further allege that the said charges, claims and demands of the said county treasurer constitute a charge against the said plaintiffs' properties and is cloud upon said plaintiffs' title to said property, and on said plaintiffs' credit, and is a wrongful, unjust and unlawful incumbrance upon the said plaintiffs and their property; and that the said defendants conceive it to be their duty to

demand and collect and receive from the said plaintiffs the
24 amount of the pretended taxes and charges, so as aforesaid extended against the said plaintiffs and the said plaintiffs' property as herein set out, and will invoke the authority conferred by law upon them to enforce the collection thereof from plaintiffs unless the said defendants are restrained and enjoined from so doing.

Plaintiffs state that they have no plain, adequate remedy at law to correct the said wrongs herein complained of.

And plaintiffs allege that the said State Board of Equalization made similar, but arbitrary and not corresponding changes in the aggregate valuation of the items of different kinds of properties as reported from the several counties of the state, and that as a result of the said changes in the said valuations of said kinds of properties

of the state that the assessed valuations of the said state were pretendedly increased from about $900,000,000 to about $1,327,000,000 and that such change is the valuation of said properties was made for the purpose of increasing the total valuation of the State, above the valuation fixed by the assessors of the said state, as equalized by the several local Boards of Equalization and that such changes did so result.

And the said plaintiffs allege that the said action of the said county clerk in so changing the returned valuations of plaintiffs' said properties on the said tax roll, and in so extending against the plaintiffs' said properties and said false and fictitious valuation so extended against the same, acted arbitrarily, and by mere guess and speculation, and without any authority of law or office, and that
25 the said county Clerk had no power or authority of law or office to add to the pretended, equalized, assessed valuation of the plaintiffs' said properties, and no authority of law or office to undertake to divide among the taxables of the said county the said pretended increase of the aggregate valuation of the said several kinds of property as in said Exhibits set out and was not vested with any authority of law or office to undertake the distribution of the same among the various taxables of said county, and that the said action of said county clerk hereinbefore set out void.

The plaintiffs further allege that said unlawful changes hereinbefore set out, and as extended against the said plaintiffs and their said properties are, aside from all the other reasons given for their invalidity, excessive and unfair, and at a valuation in excess of the actual, fair, cash value of the said properties as estimated at the price it would bring at a voluntary sale in the name of the owner thereof on the 1st day of March, 1911, or Jan. 1st, 1911. And that the taxation of plaintiffs on such valuation of said properties is a violation of the provisions of section 8, Article 10 of the constitution of the State of Oklahoma, and in violation of the provisions of the constitution of the United States, guaranteeing the said plaintiff protection for his property against exactions not authorized by due
26 process of law. And is in violations of the provisions of Section 3, Article 10 of the Constitution of Oklahoma guaranteeing to the said plaintiff, that taxes within the state should be uniform upon the same classes and subjects. (See Exhibit X.)

And the said plaintiffs allege that the said proceedings of the said L. F. Kipp by his pretended deputies are wholly void for the reasons, and on the grounds hereinbefore stated and plaintiffs allege that the proceedings of the said county clerk and the said State Auditor and the said State Board of Equalization are wholly unauthorized and void for the reasons and upon the facts hereinbefore stated, and that the said action of the county treasurer in demanding the payment of the said pretended taxes is wholly unauthorized and void.

And plaintiffs further allege that the said proceedings hereinbefore set out, so pretendedly done by the county clerk and State Auditor, and the State Board of Equalization, are in addition to the premises illegal and void for the reasons that they would result, and do result in charging said plaintiffs with taxes not uniform with

other taxables in the same class in said county and state and that such pretended taxes so as aforesaid ascertained are not uniform.

Said plaintiffs further allege they are ready, able and willing to pay any part of their tax that may be considered and adjudged by the court to be valid and legally assessed and determined
27 against the said plaintiffs on account of their ownership of said property at said time within the said county, and to do all and everything adjudged and considered by the court to be just equitable and proper.

That said land will not become less valuable prior to April 20, 1924, and that the annual tax that will be assessed against said land if defendants are not enjoined will amount to as much each year prior to April 20, 1924, as for the year 1911, said that the whole amount that will be unlawfully assessed against said land, if defendants are not enjoined, exceeds the sum of three thousand dollars ($3,000).

Wherefore, the said plaintiffs pray that the said defendants and each of them be restrained from demanding, collecting or enforcing the collection of any of the said pretended taxes so charged as aforesaid against the said plaintiffs, on account of the said pretender valuation extended against the said plaintiffs and their said property on the said pretended tax roll of said county. And that on final hearing the said defendants and each of the-, and their successors in office and all persons acting by through or under them be enjoined from collecting or attempting to collect from the said plaintiffs any pretended taxes or charges as hereinbefore set out, and for all other further and proper relief and for judgment for costs herein incurred.

W. O. CROMWELL,
Attorney for Plaintiffs.

28 STATE OF OKLAHOMA,
Muskogee County, ss:

J. I. Cromwell, one of the plaintiffs above named, first being duly sworn says: that he has read the above and foregoing petition and knows the facts and things therein contained, and that they are true according to his best knowledge and belief.

J. I. CROMWELL.

Subscribed and sworn to before me this the 6th day of November, 1912.

[SEAL.] ETNA A. MURPHY,
Notary Public.

My commission expires Dec. 7, 1915.

29 *Homestead Deed.*

Creek Indian Roll No. 2460.

The Muskogee (Creek) Nation, Indian Territory.

To all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Eliza J. Murphy, a citizen of said tribe, as a homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Eliza J. Murphy all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said
30–42 Nation in and to the following described land, viz: The North East Quarter of the South West Quarter of Section Twenty-four (24), Township Fifteen (15) North, and Range Eighteen (18) East, of the Indian Base and Meridian, in Indian Territory, containing forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, divise and descent of said land after the death of the said Eliza J. Murphy; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 20th day of April, A. D., 1903.

[SEAL.] P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,
Approved May 26, 1903.
ETHAN A. HITCH-OCK, *Secretary,*
By OLIVER A. PHELPS, *Clerk.*

* * * * * * *

43 In the District Court of Muskogee County, State of Oklahoma.

No. 2327.

D. N. FINK, O. J. FLEMING, as Trustees for W. O. Cromwell and J. I. Cromwell and All Persons Holding Contracts for Lots in Cromwell Heights Addition, Muskogee, Oklahoma, as Their Interest Appears, Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainwright, as County Treasurer of Muskogee County, Oklahoma, Defendants.

Demurrer.

Comes now the defendants herein and demur to the petition, for the reason that the facts stated in the petition do not constitute a cause of action.

W. E. DISNEY,
County Attorney.

44–60 Endorsed as follows on back of instrument: No. 2327. D. N. Fink et al. vs. W. H. Wainwright et al. Demurrer. State of Oklahoma, County of Muskogee. Filed Jan. 14, 1913. Ross Houck, Clerk of District Court. W. K. Disney, Attorneys for Def't.

* * * * * * *

61 Thereafter, at the July, 1914, Term of said Supreme Court, on the 15th day of September, 1914, the following proceeding was had in said cause, to wit:

5481.

BOARD OF CO. COMM'RS, Plaintiff in Error,

vs.

D. N. FINK et al., Defendants in Error.

And now on this day it is ordered by the court that the motion filed herein for leave to file brief amici curiæ be, and the same is hereby sustained.

62 Thereafter, at the October, 1914, Term of said Supreme Court, on the 22nd day of December, 1914, the following proceeding was had in said cause, to wit:

5481.

BOARD OF CO. COMM'RS et al., Plaintiffs in Error,
vs.
D. N. FINK et al., Defendants in Error.

And now this cause comes on for hearing before the court upon the motion of defendant in error to dismiss the appeal.

And the court having considered the same finds that the motion to dismiss should be overruled.

It is therefore ordered and adjudged by the court that the motion of defendants in error to dismiss the appeal herein be, and the same is hereby overruled.

Opinion by Loofbourrow, J.

All the Justices concur.

63 Filed Dec. 22, 1914. William M. Franklin, Clerk.

Dec. 22, 1914.

In the Supreme Court of the State of Oklahoma.

#5481.

BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY et al.,

Plaintiffs in Error,

v.

D. N. FINK et al., Defendants in Error.

1. Where an appeal is lodged in this court in which a Board of County Commissioners are plaintiffs in error, the county attorney appearing as their counsel, such attorney, being the county attorney, and an officer of the court, will be presumed to have authority to perfect and prosecute the appeal in the absence of an affirmative showing to the contrary by the Board of County Commissioners.

2. It is not essential that the Board of County Commissioners enter upon their records or minutes an order directing or approving an appeal by their County Attorney, and the fact that the records of the Board are silent on the proposition, does not raise the presumption that such appeal was not authorized or consented to by them.

(Syllabus by the court.)

Error from the District Court of Muskogee County.

R. P. DeGraffenried, Judge.

On Motion to Dismiss. Overruled.

Charles West, Attorney General, Smith C. Matson, Assistant Attorney General, and W. E. Disney, County Attorney, of Muskogee, for plaintiffs in error.

W. C. Cromwell, of Enid, Franklin & Carey, of Muskogee, for defendants in error.

64 *Opinion of the Court by*

LOOFBOURROW, *J.:*

Defendant in error moves to dismiss this appeal, one of the grounds being that the case-made does not affirmatively show that the County Attorney of Muskogee County had no authority to prosecute the appeal. Attached to the motion is a certificate of the County Clerk to the effect that the minutes and records of the Board of County Commissioners do not show that they authorized the appeal.

Counsel cite Kingfisher Co. v. Graham, 40 Okla. 571, 139 Pac. 1149, and Sequoyah Co. v. Helms, 40 Okla. 465, 139 Pac. 958 in support of the proposition. In each of the above cases the Board of County Commissioners specifically directed a dismissal of the appeal, and this court held that under such circumstances the County Attorney was without authority to maintain and prosecute the appeal. But in the case at bar the record does not disclose the attitude of the Board of County Commissioners. The County Attorney, under the law, must appear for them, and is presumed to be acting within the scope of his authority. It is not necessary, in any case where the county appeals, that the Board of County Commissioners enter upon their minutes an order directing the County Attorney to perfect and prosecute the appeal, and the absence of such an order does not give rise to the presumption that the Board are opposed to or have not consented to such appeal, but the presumption is that the County Attorney is acting within the scope of his authority. See Leedy v. Brown, Judge, 27 Okla. 494, wherein it is held:

"When an action is commenced in the district court, in the name of the state, by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been requested by the Governor or one of the branches of the Legislature."

The "affirmative showing" referred to means "an affirmative showing by the party whom the attorney represents." As in the Graham and Helms cases, supra, it does not mean that the adverse
65 party may challenge the right of the attorney appealing except when the records of the appellants or appellants themselves indicate affirmatively that they do not desire to appeal.

In San Luis Obispe v. Hendricks, 71 Cal. 246, an ordinance provided that "the tax collector may direct suit" etc. The suit being instituted by the District Attorney of the county, it was contended that the complaint should have averred that the tax collector had directed that the suit be brought, and not having done so, the demurrer should have been sustained. The court said:

"The objection goes not to the absence of any fact constituting the cause of action, but rather to the authority to bring the suit for want of an authorization from the tax collector.

"The action is instituted by the district attorney of the county—an attorney at law and an officer of the court.

"It was not necessary to state in the complaint that he was directed to bring the action. An attorney at law is presumed to be authorized by the proper party to institute the action he brings, until the contrary is made to appear."

In State v. Welbes (S. D.) 75 N. W. 821, the Attorney General, on behalf of the state, brought an action on the official bond of the County Treasurer to recover taxes collected by him. It was held that it would be presumed that the Attorney General was requested to prosecute the action.

It is unusual for this court to write an opinion where a motion to dismiss an appeal is overruled, but in view of the fact that the County Commissioners and other officers so frequently appeal, we deem it advisable to settle this question so that there could be no misunderstanding among the profession and litigants as to the law on the proposition involved.

The motion to dismiss the appeal is overruled.

All the justices concur.

66 Thereafter, at the July, 1915, Term of said Supreme Court, on the 27th day of September, 1915, the following proceeding was had in said cause, to wit:

#5481.

BOARD OF CO. COMM'RS

vs.

D. N. FINK.

And now on this day the following listed cases are submitted on the records and briefs filed herein.

66½ Thereafter, at the January, 1916, Term of said Supreme Court, on the 8th day of February, 1916, the following proceeding was had in said cause, to wit:

#5481.

BOARD OF CO. COMM'RS et al.,

vs.

D. N. FINK et al.

And now this cause comes on for final decision and determination by the court upon the records and briefs filed herein.

And the court having considered the same finds that the above cause should be reversed with directions to the trial court to sustain the demurrer. Opinion by Rummons, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

67 (Filed Feb. 8, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. One.

No. 5481.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainwright, as County Treasurer of Muskogee County, and Their Successors in Office, Plaintiffs in Error,

v.

D. N. FINK and O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition, Muskogee, Oklahoma, as Their Interest Appears, Defendants in Error.

Syllabus.

1. Grantees of a Creek homestead allotment, conveyed under authority of the Act of Congress of May 27, 1908, take their title to such allotment under the terms of said Act, and can not go behind it and claim the exemption of such allotment from taxation under the provisions of the Act of Congress of June 30, 1902.

2. Section 4 of the Act of Congress of May 27, 1908, providing that all lands from which restrictions have been removed or shall be removed shall be subject to taxation, is a condition attached by Congress to the alienation of the allotments authorized by said Act, and, upon alienation by the allottee, such lands are thereafter subject to taxation.

3. A Creek homestead made alienable by the terms of the Act of Congress of May 27, 1908, upon its alienation by the allottee, ceases to be exempt from taxation.

Error from the District Court of Muskogee County.

R. P. de Graffenried, Judge.

Action by D. N. Fink and another against the Board of County Commissioners of Muskogee County, Oklahoma, and another. From an order overruling a demurrer to the petition of plaintiffs, the defendants appeal. Reversed and remanded.

Chas. West, Attorney General, Smith C. Matson, Assistant Attorney General, W. E. Disney, County Attorney, Muskogee County, for plaintiffs in error.

68 W. C. Franklin, W. O. Cromwell, and Geo. W. Buckner, For defendants in error.

RUMMONS, *C.*:

Plaintiffs in error, hereinafter styled the defendants, appeal from an order of the District Court of Muskogee County, overruling their demurrer to the petition of defendants in error, hereinafter styled the plaintiffs.

The plaintiffs commenced this action against the defendants seeking to restrain and enjoin them from demanding, collecting or enforcing the collection of any taxes upon certain lots in Cromwell Heights Addition to Muskogee, which are a part of lands allotted as a homestead to Eliza J. Murphy, a member of the Creek tribe of Indians, and of which plaintiffs are the purchasers. Defendants interposed a demurrer to the petition of plaintiffs which was submitted to the court upon the following stipulation:

"The defendants appeared in person and by W. E. Disney, County Attorney of Muskogee County, Oklahoma, and plaintiffs appeared by their attorneys W. O. Cromwell and W. C. Franklin, and thereupon said Demurrer was argued and presented by counsel upon the ground contained in the petition of plaintiffs which alone seeks relief by way of injunction restraining the defendants from collecting taxes now or hereafter assessed against the lots and lands of the plaintiffs described in the petition, for the reason that said lots and lands are a part of the homestead of Eliza J. Murphy, a Creek Indian allottee, and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians, and for this reason the said lots and lands described in plaintiff's petition are non-taxable for the period of twenty-one years from the date of the deed or patent to said allottee for said homestead; by agreement of counsel the demurrer was urged and submitted solely upon the above question, and said demurrer was reserved and not passed upon as to any other cause for relief set up in plaintiff's petition."

It seems, under this stipulation, the only question considered by the trial court in passing upon the demurrer was whether or not the lots in question were exempt from taxation because they were
69 a part of lands originally allotted, as a homestead to a member of the Creek tribe. The sufficiency of the other allegations of the petition does not seem to have been argued to the court below,

nor is it raised or argued in this Court. We will, therefore, consider this case alone upon the question presented by the stipulation to the trial court.

The land, of which the lots in controversy are a part, was allotted to Eliza J. Murphy, a citizen of the Creek t-ibe, as a homestead, by virtue of the Act of Congress of March 1, 1901, (31 Stats. 861), and the Act of Congress of June 30, 1902, (32 Stats. 500). The Act of June 30, 1902, known as the Creek Supplemental Agreement, in section 16 provides:

"16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

As provided by the Act of June 30, 1902, the deed, conveying the homestead allotted, to Eliza J. Murphy, executed April 20, 1903, provides: "that said land shall be nontaxable and inalienable and free from any incumbrances whatever for twenty-one years."

Section 1 of the Enabling Act, under which our Constitution was drawn, provides:

"Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

70 Sec. 413, Williams' Constitution.

The provisions of the Enabling Act were adopted by Ordinance Irrevocable of the Constitutional Convention, Sec. 409 Williams Constitution. Sec. 6, art. 10 of the Constitution, relating to exemption from taxation provides, "and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws." Under the acts of Congress and the constitutional provisions above quoted, and under the provisions contained in the homestead deed to Eliza J. Murphy, the plaintiffs contend that the lots sought to be taxed are exempt from taxation until the year 1924.

The Act of Congress of May 27, 1908, (35 Stats. 312), Sec. 4, provides:

"* * * that all land from which restrictions have been or shall be removed, shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the five civilized tribes."

Plaintiffs are the grantees of the allottee, Eliza J. Murphy, having purchased her homestead allotment, and are not members of the Creek Tribe. It is contended for the defendants that because of the provision above quoted in the Act of Congress of May 27, 1908, and because title to the homestead allotment is no longer in the allot-ee that the lots in question have ceased to be exempt, and are now subject to taxation.

The plaintiffs rely upon the authority of Choate v. Trapp, 224 U. S. 664, 56 Law Ed. 941; and English v. Richardson, 224 U. S. 680, 56 Law Ed. 949. In Choate v. Trapp, supra, it was held by the Supreme Court of the United States, that the exemption from taxation of the Five Civilized Tribes provided for in the various acts of Congress relating to the allotment of the lands of said tribes constituted a vested right in the allottees, of which they could not be deprived without their consent by any subsequent act of Congress; and that such exemption was not a mere personal privilege of the Indians, but was a property right attached to their land, of
71 which they could not be deprived without their consent; it was further held that the provisions quoted above of Sec. 4 of the Act of Congress of May 27, 1908, was inoperative to subject the lands allotted to members of the Choctaw and Chickasaw tribes to taxation, while the title to such lands remained in the original allottee. The case of English v. Richardson, supra, involving the taxation of a Creek homestead, held that a Creek homestead allot-ee who received a homestead allotment which was, by the Act of Congress providing for the allotment, to be non-taxable and inalienable for a specified period, acquired a vested right to exemption from state taxation, protected against abrogation by Congress during that period. This case was a companion case to Choate v. Trapp, supra, and was determined by the same opinion. These two cases were determined upon the authority of New Jersey v. Wilson, 7 Cranch 165, 3 Law Ed. 303.

It was held by Chief Justice Marshall in New Jersey v. Wilson, supra, that:

"a legislative act, declaring that certain lands, which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act."

The Delaware Indians, in consideration of the purchase for them by the Colony of New Jersey of the tract of land, ceded to the Colony of New Jersey all their claims upon other lands in said Colony. The Act of the Legislature providing for the purchase of the lands for the Indians restricted them from granting leases or making sales, and provided that the lands to be purchased should not, thereafter, be subject "to any tax, any law, usage or custom to the contrary thereof, in anywise notwithstanding." Thereafter, the Delawares desiring to sell the lands so purchased for them, the Legislature of the State of New Jersey passed an act authorizing the sale by the Indians of such

lands. In this act no provisions was made as to the subject of
72 such taxation. Later the State of New Jersey sought to tax these lands, but were restrained at the suit of the grantees of the Indians. Chief Justice Marshall in his opinion says:

"The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

"It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Plaintiffs contend on the authority of New Jersey v. Wilson, supra, Choate v. Trapp, supra, and English v. Richardson, supra, that the exemption from taxation of the homestead of a Creek allot-ee, by virtue of the Creek Supplemental Agreement, for a period of twenty-one years runs with the land, and that the land can not be subjected to taxation during the prescribed period of exemption, even though the Creek allot-ee has alienated the lands and title to the same stands in a person not a citizen of the Creek tribe.

By the Ordinance of 1787 two townships of land in the State of Ohio were reserved for the purposes of a University. When the state of Ohio came into the Union, an act was passed establishing a University, vesting the lands in a corporation consisting of the president and trustees "for the sole use, benefit and support of the University forever." The act also provided that the lands should be forever exempt from all state taxes. Thereafter the Legislature authorized the board of trustees to sell these lands, and pursuant to that statute the lands were sold to individuals, who took title in fee. No exemption from taxation was mentioned in the statute authoriz-
73 ing the sale or in the deeds conveying the lands to the individuals. The grantees claimed the lands to be exempt from taxation by virtue of the first act of the legislature. The Supreme Court of the United States, in Armstrong v. Athens County, 16 Peters, 281, 10 Law Ed., 965, denied the claim of the grantees. Mr. Justice Catron, writing the opinion of the Court, says:

"But what was the policy of the Act of 1826? An entire change of the fund from real estate to a capital in money vested by loan in the State treasury was determined on by the corporation. Leave was asked and granted by the Legislature to sell the lands, and convey them in fee simple to purchasers, giving the tenants a preference in cases where there were existing leases. As regarded the management and nature of the fund to sustain the university, the Act of 1804 was to a great extent repealed; by that act, the lessees of the corporation were governed: their contract- were founded on it; but with it the

purchasers in fee had no concern; their contracts originated in a different policy, * * * and are sanctioned by a different statute; the complainants actually claim, and could only claim by force of the Act of 1826. This act secures the payment of no taxes to the university, as the substitute of the State. It simply authorized the corporation to sell as an individual might sell, and the respective purchasers took title as from an individual; they were strangers to the Act of 1804, with the exception of those provided for by the third section of the Act of 1826, the value of whose lands were to be governed by the assessment of their rents under the former act, and who were entitled to have deeds in fee on the payment of one hundred dollars for every six dollars of annual rent assessed upon them, disregarding the taxes they were bound by the Act of 1804 to pay to the corporation. The mode of ascertaining the value makes no difference; all the purchasers hold under the Act of 1826, and cannot go behind it; and are subject, like other persons holding lands in fee, to be taxed by the State."

The reasoning of this case is peculiarly applicable to the case at bar. Congress by various acts after the allotment acts, and particularly by the Act of May 27, 1908, evidenced a determination to adopt an entirely new plan in dealing with the lands of certain classes of allot-ees. These classes were to be permitted to deal with their lands as any other citizen of the State might. The free right of alienation was granted to these allot-ees under the terms of the Act of May 27, 1908. We feel convinced that as the plaintiffs in
74 this case took their title to the lots they are seeking to exempt from taxation by virtue of the terms of this Act they can not go behind it. But for that Act they could not have purchased the lands in question. They took subject to all the conditions of that Act, and they can not now claim the benefits of the exemption from taxation granted to the allot-ee by the Creek Supplemental Agreement.

Gondy v. Meath, 203 U. S. 146, 51 L. Ed. 130.

The Act of Congress of May 27, 1908, is a comprehensive revision of the laws relating to the Five Civilized Tribes and their lands and the title thereto, which should be construed so as to give effect to the intent of Congress as evidenced therein. It seems evident from the Act that Congress in the exercise of its plenary power to control the Indians and their affairs determined that certain classes of citizens should be relieved from their tutelage, and left free to deal with and control their lands as they might see fit. The grantor of plaintiffs was one of the citizens so enfranchised and permitted to alienate her lands at will. Was it the intention of Congress to grant this right of unrestricted alienation to these classes of Indian citizens without condition? It was held in Choate v. Trapp, supra, that the restriction upon alienation and the exemption from taxation were independent of each other, and not so related that the removal of one destroyed the other. In New Jersey v. Wilson, supra, Chief Justice Marshall said:

"It is not doubted but that the State of New Jersey might have in-

sisted on a surrender of this privilege as a sole condition on which a sale of the property should be allowed. But this condition has not been insisted upon."

It is clear that Congress could not enact a law depriving the citizens of the Five Civilized Tribes of the exemption from taxation granted them by the acts under which they took their allotments. Nor could Congress compel the allot-ee to alienate his lands. As a ward of the government, he was subject to the control of Congress in the matter of the alienation of his lands, and we see no reason to
75 prevent Congress from granting the right of unrestricted alienation upon condition; and, if the allot-ee accepted the privilege of alienation, he would also accept the conditions imposed upon such privilege.

Can section 4 of the Act of May 27, 1908, be construed as imposing a condition upon the right of alienation granted in the Act to certain classes of citizens? The primary thing to be considered in the construction of a statute is the intent of the legislature, and that intent may be arrived at by considering the purpose of the legislation, the subject thereof, and the history of other legislation relating to the same subject. "A statute should be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, so as to make it valid and effective." 2nd Lewis' Sutherland Statutory Construction, Sec. 516, 2nd Ed. "The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective from want of power as from that which is authorized by law." Barrett v. Hutchison, 179 Ill. 435, at p. 440, 53 N. E. 567.

"In construing an act it is a principle of interpretation that the object must be borne in mind, and language susceptible of more than one construction should receive that which will effect its purpose rather than defeat it. A presumption is always indulged in favor of the constitutionality of an act, and that construction will be adopted which will sustain the act, where the language used will permit such interpretation. In construction, words may be restricted or enlarged, according to the intent with which they were used, and their meaning as used may be gathered from the purpose of the enactment. And when necessary that which is implied as well as that which is expressed may be held to be included within a statute." People v. Hinrieson, 161 Ill. 223 at 226, 43 N. E. 973.

"The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of statutes." 2nd Lewis' Sutherland Statutory Construction, Sec. 374, 2nd Ed.

"In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and the necessity of the law; from the mischief felt; and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion." 1st Kent's Commentaries, 461.

76 Under these canons of construction, taking into consideration the subject of the Act of Congress of May 27, 1908, and the long history of legislation by Congress as to the Five Civilized Tribes and their lands, we are convinced that the purpose of Congress in exempting the homestead allotments of the Creek tribe from taxation, and requiring the state of Oklahoma in its Constitution to give effect to the exemption so granted, was solely for the protection of the members of the Creek tribe; that Congress intended by the Supplemental Agreement to convey to the members of the tribe homesteads which could not be taken from them for the payment of taxes. The constitutional provision of the State of Oklahoma quoted above gives full effect to the purpose of Congress. But can it be said that when Congress determined that certain classes of Creek citizens were competent to attend to their own affairs, and to alienate their lands at will, it also intended that such lands should continue to escape the burdens of government after they had passed from the hands of the Creek citizen? Such a conclusion would lead to the greatest discrimination and injustice between citizens and would so derogate from the power of taxation essential to the maintenance of government that we do not think that the Act of Congress of May 27, 1908, is open to this interpretation. As was said by the Supreme Court of the United States, the exemption from taxation of the lands of the Indians is a valuable right; but is not the right to freely alienate one's lands also a valuable right? We think there can be no doubt that it is a right of the highest value. The history of the law of tenures of real estate in England, and the shifts and devices invented and used by the English lawyers of the middle ages, such as fine and recovery, to evade the statute de bonis and to enable English landowners to break the entail and freely convey their lands, show

77 that at all times under our system of real estate law the right to alienate one's real estate unrestricted has been most highly prized by the land owner. We think the intent of Congress by that Act was to say to the Creek citizen, we have given you lands which are non-taxable and inalienable for twenty-one years; the exemption from taxation adds value to your lands; the restriction upon alienation impairs that value; we will now offer you the privilege of unrestricted alienation, but, if you elect to avail yourself of this privilege, your lands will, upon alienation, become subject to taxation in the hands of your grantee. We think Congress clearly had authority to remove the restrictions upon alienation upon such a condition, and, if the Creek citizen undertook to avail himself of the privilege of alienation, the subjection of his homestead to taxation thereafter would not deprive either him or his grantee of any vested right, nor would it be in contravention of the fifth amendment to the Constitution of the United States.

We are not without authority on this question from our own Court. The Act of Congress of April 26, 1906, (34 Stats. 137), Sec. 191, provides:

"Provided further, That all land upon which restrictions are removed shall be subject to taxation, and the other lands shall be

exempt from taxation as long as the title remains in the original allottee."

In the case of Schock v. Sweet, — Okla. —, 145 Pac. 388, this Court held, that the homestead conveyed by an allottee, whose restrictions were removed under the provisions of the Act of Congress of March 3, 1903, (32 Stats. 996), after the taking effect of the Act of April 26, 1906, was subject to taxation after alienation by the allottee. Mr. Justice Riddle, delivering the opinion of the Court, says:

"The purpose for which the exemption was made has ceased to exist, and the exemption itself must fall. In construing all laws, it is the cardinal rule to ascertain the intent of the lawmakers. There is nothing in this provision of the agreement, or in any prior or subsequent acts of Congress dealing with these Indian tribes, that evidences a purpose in Congress to grant an exemption from taxation of the property in question in the hands of third parties, who
78 are not members of said Indian tribes. On the contrary, the provision of the act of April 26, 1906, expressly provides that the homesteads shall be non-taxable so long as the title remains in the allottee, which is equivalent to saying that, when the title passes out of such allottee, the land shall be subject to taxation. * * *

"It was upon her application that the restrictions upon her alienation of said land were removed. At the time this application was made, the act of Congress of April 26, 1906, was in full force and effect. Except under the act of Congress of March 3, 1903, supra, the allottee could not have alienated the lands in question; neither could plaintiffs have obtained any title to the land. Hence it may well be said that it is by virtue of and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that, where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld."

Rider v. Helms, — Okla. —, 150 Pac. 154;
Rogers v. Herndon, — Okla. —, No. 4827, decided January 24, 1916.

The only distinction between the case of Schock v. Sweet and the case at bar lies in the fact, that in that case the restrictions of the allottee were removed by order of the Secretary of the Interior, upon application of the allottee, while in the case at bar the restrictions were removed by virtue of the Act of Congress of May 27, 1908. We think the case of Shock v. Sweet, supra, settles the law of this State adversely to the contention of plaintiffs.

We, therefore, conclude that the trial court erred in overruling the demurrer of defendants to the petition of plaintiffs, and that this cause should be reversed with directions to the trial court to sustain such demurrer.

Feb. 8, 1916.

BY THE COURT.

Adopted in whole.

79 In the Supreme Court of the State of Oklahoma.

Filed Feb. 22, 1916. William M. Franklin, Clerk.

No. 5481.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainright, as County Treasurer of Muskogee County, and Their Successors in Office, Plaintiffs in Error,

vs.

D. N. FINK and O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition, Muskogee, Oklahoma, as Their Interest Appears, Defendants in Error.

Petition for a Rehearing.

Comes now the defendants in error in the above entitled cause and petition this Honorable Court to set aside and vacate the decision rendered and filed in this cause in this court on the 8th day of February, 1916, by Commissioner Rummons, of Division Number One of the Supreme Court Commission, and to grant them a rehearing in this cause, and on account of the great public importance of the cause, that it be assigned to and heard by the Supreme Court to the exclusion of any Commission of said Court, because petitioners say that the sole question presented and decided in this cause is a federal question arising under the laws and constitution of the United States and involves the right of the State of Oklahoma acting through its officers to impose and collect taxes on the homestead of Eliza J. Murphy a Creek Indian allottee and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians domiciled in the State of Oklahoma, which homestead was by the United States deeded to Eliza J. Murphy on the 20th day of April, 1903, and approved by the Secretary of the Interior of the United States on the 26th day May, 1903, and which deed pursuant to agreement between the United States and the Tribe or Nation of Indians of which the grantee therein is a member and pursuant to acts of Congress of the United States, contained the provision that said homestead shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed to said homestead. It being the contention of the plaintiffs in error, that the State
80 of Oklahoma has the right to tax this homestead during the period it is exempted from taxation in the deed, and this right they claim under and by virtue of the terms of the Act of Congress of May 27, 1908; and it being the contention of the defendants in error, that said act gives no such authority, but if it did, that then any such subsequent act either of the Congress of the United States or any act of the legislature of the State of Oklahoma, permitting or attempting to tax the land described in the

homestead deed, is an act which impairs the obligation of the contract evidenced by such deed, and is therefore unconstitutional and void, for conflict with the fifth and fourteenth amendments to the constitution of the United States.

Petitioners further say, that in order to fully preserve and present singly and alone the above federal question to this Court, and to the Supreme Court of the United States, in the event that the decision of this Court shall be adverse to their contention, they have filed in the District Court of Muskogee County, Oklahoma, the Court from which the appeal in this cause came to this Court, a motion dismissing all that portion of their petition in this cause which complains of and seeks relief from the taxes imposed on said land for the reason that they are irregular, illegal or void on account of any other matter or things than that they are illegal and void because prohibited by the contracts, constitution and laws of the United States, and upon said motion petitioners have caused an order to be entered in said Court in said cause dismissing such portions of their petition in this cause. Certified coppies of said motion and the order based thereon are hereto attached — made a part hereof marked Exhibits "A" and "B" respectively.

Petitioners further say that there is manifest error in the opinion and decision of Commissioner Rummons rendered and filed in this cause on the said 8th day of February, 1916, in this to-wit:

First.

That said decision is in direct conflict with several controlling decisions of the Supreme Court of the United States on the question involved and decided in said decision, which decisions are hereinafter set out in detail.

Second.

That said decision is in direct conflict with a controlling
81 decision of this Court which was duly submitted by counsel and not noticed by the Honorable Commissioner in his decision in this cause, which decision is hereinafter set out in detail.

Third.

That said decision is in direct conflict with a controlling decision of the Supreme Court of the United States rendered on the 20th day of December, 1915, which decision was not called to the attention of the Honorable Commissioner in this cause, but is hereinafter set out in detail.

Fourth.

That said decision is in direct conflict with controlling statutes of the United States which were duly submitted by counsel in their brief.

In support of the several grounds for a rehearing in this cause petitioners respectfully show to the court, that Commissioner Rummons, in denying the application of the law as announced by the Supreme Court of the United States to be applicable to the facts in this case, apparently rests his decision upon the premis-, that the purchaser of the exempted Indian homestaed having acquired title to the homestead under the authority of the Act of Congress of May 27, 1908, removing the restriction as to alienation of the homestead by the Indian, and providing that land from which such restriction has been or shall be removed shall be subject to taxation, is, by reason of having purchased the homestead from the Indian under the authority confer-ed on the Indian to alienate it by the act, thereby estopped to assert that the land is not taxable. But this is a false premis-. Because there is no privity between the United States and the State of Oklahoma upon which it can invoke such an estoppel (16, Cyc. 716) and further if there was such privity the State of Oklahoma by its constitution has precluded itself from asserting any such estoppel. And the premis-, is principally false for the reason, that to impose this condition on the purchaser of necessity imposes the same condition on the homesteader thereby penalizing him by immediately distroying and depriving him of his vested rights of property (the exemption of his homestead from taxation for 21 years) this previously vested property right is a valuable property right because it gives an increased value to the homestead and is therefore a part of the property value of the homestead and it must follow that if the homestaed would
82 become immediately taxable in the hands of the purchaser then the exemption of the homestaed from taxation which gave an added value to it would be immediately distroyed and the homesteader by accepting the opportunity to alienate his land under the provision of the Act would be compelled to surrender the previously vested property right and the value thereof attached to his land by virtue of the tax exemption, the value of which in Oklahoma considering the average value of non-mineral lands and the average tax rate for twenty-one years is apparent to the Court, and as stated by the Supr-me Court of the United States the purpose and effect of this tax exemption was to add value to the homestaed because in the event of sale, upon which alone the question could become material the value of the homestead would be enhanced, that the purchaser stands with respect to the land in the position of the Indian, and that any law distroying the tax exemption is void.

The provision of the Act of May, 27, 1908, which the Honorable Commissioner holds estops the purchaser from claiming the benefit of the tax exemption in this case, has been so repeatedly held void by the Supreme — of the United States when and wherever it has been attempted to give to it the force, effect and application that the Honorable Commissioner attempts to give it in this case, that it would seem that its effect, construction and application aught to be settled and accepted as settled by this Court for the law involved being a law of the United States and its effect, construction and

application when applied to the facts in this case having been fully determined by the Supreme Court of the United States there would ordinarily seem to be no open question concerning the operation and effect of the act when applied to the facts of this case especially in view of those decisions which are as follows:

Choate vs. Trapp, 224, U. S. 655-679—56, L. Ed. 947, the Court said: "The constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute. The decree refusing to enjoin the assessment of the taxes on the exempt lands of plaintiffs must therefore be reversed and the case remanded for further proceedings not inconsistent with this opinion."

83 New Jersey vs. Wilson, 7, Cranch, U. S. 164; 3, L. Ed. 303, the Court said: "the privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land, not to their persons. It is for their advantage that it shou-d be annexed to the land, because, in the event of sale, on which alone the question could become material, the value would be enhanced by it. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds with the assent of the state to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Choate vs. Trapp, supra, the court said: "Choctaw and Chickasaw allot/ments, under the Atoka Agreement, embodied in the Act of June 28, 1898, under which, in part consideration of their relinquishment of all claim to the tribal property, they were to receive allot/ments of land in several/ty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested rights of exemption from state taxation protected by the United States Constitution, 5th. Amendment, from abrogation during that period as was attempted by the Act of May 27, 1908, (35 Stats. At Large 312 c. 199) removing the restrictions upon alienation and providing that lands from which such restrictions have been removed should be subject to taxation," and in the course of the opinion at page 946 the court said that the provision that "all land shall be non-taxable naturally indicates that the exemption is attached to the land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for a limited period, that doubt, under this rule must be resolved in favor of the patentee."

Gleason vs. White, 224, U. S. 669, 56, L. Ed. 947, to same effect.

English vs. Richardson, 224, U. S. 680, 56, L. Ed. 949, the Court said: "A Creek homestaed allottee under an agreement in-
84 corporated in congressional legislation by which in part consideration of the relinquishment by the Indians of their claim to tribal property they were to receive homestaed allottments which should be non-taxable and inalienable for a specified period, acquired a vested right to exemption from state taxation protected by the Federal constitution against abrogation by Congress during that period." And in the course of the opinion at page 951 the Court said: "The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of the Creek Nation when the tribal lands were devided in pursuance of the same general policy as that discussed in Choate vs. Trapp, just decided (224 U. S. 665 ante 941: 32 Sup. Ct. 565). There were however a few differences. The tax exemption covered only the homestead of forty acres and there was a restriction on alienability for 21 years. The patent instead of being framed in conformity with the agreement, as the case of the Choctaws and Chickasaws bore on its face a provision that the land should be non-taxable; the language of the agreement incorporated in the Act of Congress being that, each citizen shall select from his allottment forty acres of land as a homestead which shall be and remain non-taxable, inalienable and free from any incumberance whatever for 21 years from the dtate of the deed therefore, and a seperate deed shall be issued to each allottee for said homestaed in which this condition shall appear (32 Statutes At Large 503 c. 1323 Sec. 16). These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the constitution on principles stated and applied in Choate v. Trapp. The judgment dismissing her complaint is therefore reversed and the case remanded for further proceedings not inconsistent with that opinion."

The Honorable Commissioner noticed the above cases in his decision but cast them aside because of his opinion that it was not the intent of Congress that its Act should have the effect that those decisions stated that it did have, and because in his opinion the said Act of Congress can be given the effect stated in those opinions and be constitutional; but in so concluding he wholly overlooked and failed to consider the case of Whitmire vs. Trapp, 126 Pac. 578, a controlling decision of this Court on the questions involved and decided by him in this case. In that case this Court said: "Cherokee
85 allottees by virtue of the Cherokee agreement under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allottemtns of land in severalty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested right to exemption from state taxation protected by the United States Constitution, Fifth Amendment, from abrogation during that period as was attempted by the Act of May 27th, 1908 (35 Stats. At Large 312 c. 399) removing the restrictions upon alienation and providing that lands from which such restrictions had been removed should be subject to taxation."

Petitioners further say, that the decision of the Honorable Commissioner, in this case, is in conflict with the following controlling decision of the Sup-eme Court of the United States on the questions involved in this case, which decision was not called to the attention of the Court at the time this cause was submitted for the reason said decision was not rendered until the 20th day of December, 1915, subsequent to the submission of this cause, the decision is as follows:

Williams v. Johnson, U. S. Adv. Ops. 1915, pages 150-1-2. In which the Court said: "It is conceded by plaintiffs in error that an act of Congress can supersede a prior treaty, but they insist that it is well settled 'that Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee.' Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, and Jones v. Meehan, 175 U. S. I, 44 L. ed. 49, 20 Sup. Ct. Rep. I, are cited, and incidentally Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, and Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494.

The cases do not apply. It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation. Marchie Tiger v. Western Invest. Co. supra. Against this ruling Choate v. Trapp does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an act of Congress containing a provision 'that the land should be
86 non-taxable' for a limited time; and, excluding the application of the Marchie Tiger Case, it was *siad* that exemption from taxation 'and nonalienability' were two sepe*r*ate and distinct objects.' And further, 'One conveyed a right and the other imposed a lim-tation.' The power to do the latter was declared, and it was said 'the right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That the right fully vested in the Indians and was binding upon Oklahoma."

The Acts of Congress mentioned in the homest*ae*d deed involved in this case are as much a part of the contract as if they had been set forth in its stipulations in the very words of the law.

McCracken v. Hayward, 2 How. U. S. 608, II L. Ed. 400.

The State of Oklahoma by reason of the provisions of the enabling Act of Congress and the provisions of its constitution in pursuance thereof is estop-ed to assert a right of taxation in this case.

8 Cyc. 930-931-932. U. S. v. Rickert 188 U. S. 437-47 Law. ed. 536; Parker v. Windsor 5 Kan. 218.

If we are to infer from the statements of the Commissioner in his opinion concerning the dictum in the case of New Jersey v. Wilson to the effect that "It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as a sole condition on which a sale of the property should be allowed. But this condition has not been insisted upon." That he intended thereby to hold that this is sufficient authority for the United States in this case to insist upon such a condition upon a sale of the property, and that the United States has exercised this right by placing the provision in the Act of May 27, 1908, to the effect that in case of a sale of the property it shall become subject to taxation: we are constrained to say that the Honorable Commissioner does not understand the force and effect of this dictum and misapplies it to the facts in this case. It of course would be conceded in this case that the United States at the time of making the contract with the Indians could have insisted on such a provision being placed in the
87 contract, and it would have been valid and binding, but the United States did not insist on such a provision being placed in the contract as a part of the consideration therefor, and it can not now by subsequent legislation force such a condition in the contract. This very thing was attempted by the legislature of New Jersey by later repealing the act which confirmed the agreement with the Indians stating that the land should be nontaxable, and the Supreme Court of the United States adjudged the repealing act which sought to tax the land to be unconstitutional and void. The legislature could not do indirectly that which it could not do directly, nor can the Congress of the United States. It is no argument in support of the taxation of these exempted lands to say that the Act of May 27, 1908, does not in terms attempt to repeal the prior act confirming the agreement with the Indians, for it makes no difference whether it is a direct or implied repeal, and of necessity it is one or the other if it has the effect to reach back and distroy vested rights of property by or though any means whatever whether the means be those of extortion, coercion or reprisal they would be equally obnoxious to the constitution of the United States for that instrument does and will protect this contract and those vested property rights thereunder.

Wherefore petitioners pray that they be granted a rehearing in this cause, and that an order be made staying the mandate of this Court in this cause pending said hearing, and that this cause be considered and determined by the Supreme Court to the exclusion of any Commission thereof, and for all proper relief.

Respectfully Submitted,

D. N. FINK, AND
O. J. FLEMING,
Plaintiffs in Error.

By W. O. CROMWELL,
GEO. W. BUCKNER,
W. C. FRANKLIN, AND
J. D. SIMMS,
Their Attorneys.

88 Filed Feb. 29, 1916. William M. Franklin, Clerk.

In the District Court of Muskogee County, State of Oklahoma.

No. 2327.

D. N. FINK, O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition, Muskogee, Okla., as Their Interests Appears, Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Okla., and W. H. Wainright as County Treasurer of Muskogee County, Okla., and Their Successors in Office, Defendants.

Motion to Dismiss Parts of Petition.

Comes Now D. N. Fink and O. J. Fleming, as Trustees and plaintiffs in the above entitled action, and dismiss from their petition and withdraw from the consideration of the Court, the following paragraphs and parts of paragraphs contained in their petition in this cause, as appears in the copy of said petition contained in the case-made on appeal in this cause, to-wit: First, all of the second and third paragraphs on page two of their petition. Second, all of the second paragraph on page five of said petition except the first thirteen words of said paragraph and the last forty-nine words of said paragraph. Third, all of the third paragraph on page six of said petition except the first thirty-four words thereof. Fourth, all of the paragraphs and parts of paragraphs included on pages eight and nine of said petition, commencing on page eight with the words "And plaintiffs allege that the said State Board." And continuing down to and including the words "on the 1st day of March, 1911, or Jan. 1st, 1911," found in the twentieth line on page nine of said petition. Fifth, and all of the third paragraph on page ten of said petition. It being
89 the purpose and intent of this motion, to dismiss from said petition, and this action, all questions as to the regularity or validity of the taxes involved in this action arising from acts of City, County, Township or State Officers imposing said taxes, which can or may be determined solely by local or State laws, and to place this cause of action solely upon the basis of the federal question involved, to-wit: That the pretended taxes imposed on the lands of the plaintiffs by the officers of the state of Oklahoma acting under any pretended legislative authority of the state of Oklahoma or with the consent of the Congress of the United States are illegal and void, because they are imposed in violation of the fifth and fourteenth amendments to the constitution of the United States; and for the further purpose of making the ruling of this court on the demurrer of the defendants to the petition in this cause, and likewise the ruling of the Supreme Court of the State of Oklahoma reversing the ruling of this court on said demurrer each final adjudications of this cause, in order to

obtain a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma to review its decision of this cause.

Wherefore plaintiffs pray that an order be entered by the court in this cause dismissing all allegations contained in the petition in this cause designated in this motion.

(Signed) W. C. FRANKLIN,
W. O. CROMWELL &
GEO. W. BUCKNER,
Attorneys for Plaintiffs.

Exhibit "A."

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, C. H. Shaffer, Court Clerk of Muskogee County, Oklahoma, and Clerk of the District Court of said County and State do
90–99 hereby certify, that the above and foregoing motion, in the above and foregoing cause, was duly filed by me as such Clerk in said cause on the 24th day of February, 1916. And I further certify that at the time I filed said dismissal that I noted the same on the proper record of said Court.

In witness whereof, I have hereunto set my official signature and affixed the seal of said Court, at Muskogee, Oklahoma, this the 24th day of February, 1916.

(Signed) C. H. SHAFFER,
Court Clerk,
[SEAL.] By TOM L. FULLER, *Deputy.*

(Stamp.)

Exhibit "B."

Harris-Day Code sec. 2126.

* * * * * * *

100 Thereafter, at the July, 1916, Term of said Supreme Court, on the 25th day of July, 1916, the following proceeding was had in said cause, to wit:

#5481.

BOARD OF CO. COMM'RS

VS.

D. N. FINK et al.

And now on this day it is ordered by the court that the petition for rehearing filed in each of the above entitled and numbered causes, be, and the same are each hereby denied.

101 In the Supreme Court of the State of Oklahoma.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainright as Treasurer of Muskogee County, Oklahoma, and Their Successors, in Office, Plaintiffs in Error,

vs.

D. N. FINK and O. J. FLEMING, as Trustees for lots in Cromwell Heights Addition to Muskogee, Oklahoma, as Their Interest Appears, Defendants in Error.

Cause No. 5481.

Motion to Enter Final Judgment in This Court.

Comes now the defendants in error in the above entitled cause and move the court to enter final judgment in this cause in this court in order to expedite the appeal in this case, which judgment it is provided may be entered by this court under section 5258 of Revised Laws of 1910. Said final judgment requested to be entered in this cause is prepared, agreed to by the Attorney General representing the plaintiffs in error in this cause and is submitted herewith for the approval of the Court.

The purpose of this motion and judgment is solely to avoid the delay necessary should the case be reversed with directions to the lower court.

W. O. CROMWELL &
GEO. W. BUCKNER,
Enid, Okla.
W. C. FRANKLIN &
J. D. LEWIS,
Muskogee, Okla.,
Attorneys for Defendants in Error.

Filed July 31, 1916. William M. Franklin, Clerk.

102 Filed in Supreme Court of Oklahoma Aug. 15, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5481.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainright, as Treasurer of Muskogee County, Oklahoma, and Their Successors in Office, Plaintiffs in Error,

vs.

D. N. FINK and O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition to Muskogee, Oklahoma, as Their Interest Appears, Defendants in Error.

Journal Entry of Judgment.

Now to-wit: On this 25th day of July, A. D. 1916, the above entitled cause came on for hearing upon the petition of the defendants in error to vacate the decision rendered and filed in this cause on the 8th day of February, 1916, and to grant a rehearing in said cause; and the court after considering said petition and being sufficiently advised in the premises, finds that said petition should be in all things denied and overruled.

It is therefore considered, ordered and adjudged by the court that the decision rendered and filed in this cause in this court on the 8th day of February, 1916, be and the same is hereby affirmed and sustained.

And it is further considered, ordered and adjudged, that the judgment of the District Court of Muskogee County, Oklahoma, overruling the demurrer of the plaintiffs in error in this cause to the petition of the defendants in error filed in said court in this cause, be and the same is hereby vacated and reversed, and the said demurrer is hereby sustained, and the said petition and cause of action of the defendants in error in this cause is hereby dismissed, at the costs of the defendants in error.

And it is further ordered, considered and adjudged, that the judgment, decision and orders of this court in this cause be stayed pending the disposition of the appeal or proceedings in error from the said judgment, decision and orders of this court by the defendants in error to the Supreme Court of the United States upon the execution by the defendants in error of a good and sufficient bond in the sum of $10,000.00 to be approved by the Clerk of this court or the Chief Justice thereof, conditioned that the plaintiffs in error will prosecute their appeal and proceedings in error in this cause to effect and without unnecessary delay, and that they will pay all taxes and costs involved in this cause in case the judgment, decision and final

orders of this court in this cause shall be affirmed by the Supreme Court of the United States.

Witness the Honorable Mathew J. Kane, Chief Justice, of the Supreme Court of the State of Oklahoma, the day and year first above written.

[SEAL.]

M. J. KANE,
Chief Justice.

Attest:
WM. M. FRANKLIN, *Clerk.*

O. K.
ATTORNEY GENERAL,
By SMITH C. MATSON,
Ass't Att'y Gen'l.

103 In the Supreme Court of the State of Oklahoma.

No. 5481.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainright, as County Treasurer of Muskogee County, and Their Successors in Office, Plaintiffs in Error,

vs.

D. N. FINK and O. J. FLEMING, as Trustees for Lots in Cromwell Heights Addition to Muskogee, Oklahoma, as Their Interest Appears, Defendants in Error.

Certificate to Transcript.

I, William M. Franklin, Clerk of the Supreme Court of the state of Oklahoma, hereby certify the foregoing record and transcript consisting of 102 pages constitutes a full, true and correct copy of the proceedings had and filed and judgments and orders made and entered in the above entitled cause, as set forth therein; as the same appears on file and of record in this office, with the exception of the writ of error, and the petition for, and order allowing same, and the order allowing an appeal and the citations on the writ of error and appeal, and the assignment of errors herewith attached, at pages 1, 2, 3, 4, 5, 6, 7, and 8, 9, & 10, respectively, which are the original writ, petition, order, citations and assignment of errors. The foregoing constitutes the entire transcript and record in this cause.

Witness my hand and the official seal of said court, at Oklahoma City, Oklahoma, this 9th day of October, A. D. 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

104 In the Supreme Court of the United States.

No. —.

D. N. FINK and O. J. FLEMING, Trustees, Plaintiffs in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, Oklahoma, and W. H. Wainright, Treasurer of Muskogee County, Oklahoma, and Their Successors in Office, Defendants in Error.

Stipulation as to Printing of the Record.

It is hereby stipulated by counsel for the parties to the above entitled case, that in the printing of the transcript of the record therein, the Clerk shall omit those portions thereof indicated in the memorandum of "Inclusions and Omissions Suggested" hereto attached.

W. O. CROMWELL, AND
J. D. SIMMS,
GEORGE W. BUCKNER,
Solicitors and Counsel for Plaintiffs in Error.
FRED P. BRANSON,
Co. Att'y;
S. P. FREELING,
Att'y Gen'l, and
SMITH C. MATSON,
Ass't " "
R. E. WOOD,
Ass't Attorney Gen.,
Solicitors and Counsel for Defendants in Error.

Dated October 9th, 1916.

Memorandum of "Inclusions and Omissions Suggested."

(1) Print, Original petition and exhibit first thereto, being the homestead deed to Eliza J. Murphy. (Found on pages 17 to 30 inclusive, transcript of record.)

(2) Print, Demurrer to petition. (Found on page 43 of record.)

(3) Print, Journal Entry on Demurrer. (Found on pages 49-50-51 of record.)

105 (4) Print, records of Supreme Court of Oklahoma showing filing and disposition of appeal. (Found on pages 66 and 66½ of record.)

(5) Print, Decision of the Supreme Court of Oklahoma. (Found on pages 67 to 78 inclusive of the record.)

(6) Print, The Petition for a Rehearing and the exhibits thereto, being a dismissal of portions of plaintiffs' petition in the cause. (Found on pages 79 to 90 inclusive of the record.)

(7) Print, The Application for, and the final judgment of the Supreme Court of Oklahoma dismissing the petition of the plaintiffs. (Found on pages 101 and 102 inclusive of the record.)

(8) Print, The Assignment of Errors; Omitting the title of the cause and court. (Found on pages 4 to 6 inclusive of the record.)

(9) Print, Petition for Writ of Error and Order allowing same, omitting title of court and cause. (Found on page 3 of record.)

(10) Print, Writ of Error and Return thereto; omitting title of court and cause. (Found on pages 7 and 8 inclusive of the record.)

(11) Print, Citation on Writ of Error and service thereof; omitting title of court and cause. (Found on page one of record.)

(12) Print, Petition for appeal and order allowing appeal; omitting title of court and cause. (Found on pages 9 and 10 inclusive of record.)

(13) Print, Citation and service thereof on appeal, omitting title of court and cause. (Found on page two of record.)

(14) Print, Certificate of Clerk to transcript. (Found on page 103 of the record.)

(15) Print order of Supreme Court of State denying petition for rehearing on page 100 of the record.

Endorsed on cover: File No. 25553. Oklahoma Supreme Court. Term No. 723. D. N. Fink and O. J. Fleming, as trustees, &c., plaintiffs in error, vs. The Board of County Commissioners of Muskogee County, Oklahoma, et al. Filed October 14th, 1916. File No. 25553.

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IN THE

Supreme Court of United States

OCTOBER TERM, 1916.

D. N. FINK AND O. J. FLEMING, TRUSTEES,
Plaintiffs in Error and Appellants,
v.
THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.,
Defendants in Error and Appellees.

No. 723

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFFS IN ERROR AND APPELLANTS.

STATEMENT OF THE CASE.

The plaintiffs in error and appellants commenced this suit in the District Court of Muskogee County, Oklahoma, against the defendants in error and appellees, to enjoin them from collecting taxes levied and assessed by the State of Oklahoma on the homestead of Eliza J. Murphy, a Creek In-

dian allottee and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians domiciled in the State of Oklahoma.

The plaintiffs in error and appellants hold the land involved as trustees of the grantees of Eliza J. Murphy, and in their petition filed in said court seeking to enjoin the collection of the taxes aforesaid they based their right to said injunction on the ground, among others, that the lands sought to be taxed was the homestead of Eliza J. Murphy, a Creek Indian allottee, and that under the laws of the United States and the treaties between the United States and the Creek Tribe or Nation of Indians domiciled in Oklahoma, the said homestead was exempt from taxation for the period of twenty-one years from the date of the deed to said homestead, and that said exemption was a vested property right, based upon the consideration of the homesteader, Eliza J. Murphy, relinquishing all claim to the tribal property of the Creek Nation and accepting an allotment and homestead in severalty, and that the land taxed was the homestead set apart to Eliza J. Murphy under said laws and treaties. A copy of the homestead deed to said land was attached to and made a part of their petition, and is in words and figures as follows (Rec. Print. 16):

"Homestead Deed.

Creek Indian Roll No. 2460.

The Muskogee (Creek) Nation, Indian Territory.

To all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said Tribe by the United States Commission to the Five Civilized Tribes so as to give an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Eliza J. Murphy, a citizen of said Tribe, as a homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Eliza J. Murphy all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: The North East Quarter of the South West Quarter of Section Twenty-four (24), Township Fifteen (15) North, and Range Eighteen (18) East, of the Indian Base and Merid-

ian, in Indian Territory, containing forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Eliza J. Murphy; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 20th day of April, A. D. 1903.

(Seal) P. Porter,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

Approved May 26, 1903.
Ethan A. Hitchcock, Secretary,
By Oliver A. Phelps, Clerk.''

To this petition the defendants in error and appellees filed a general demurrer (Rec. Print. 17).

Upon agreement of counsel and the court the cause was submitted and argued on the sole question whether or not the lands taxed, being a Creek Indian homestead, was exempted from said taxes for the period of twenty-one years from the date

of the deed thereto, by the laws, contracts and treaties of the United States.

The court, upon consideration of said cause, held that the said land was exempt from taxation for the period of twenty-one years from the date of the deed to Eliza J. Murphy and that the exemption ran with the land and passed to her grantees during that period, and thereupon overruled the demurrer and enjoined the collection of said taxes.

The defendants in error and appellants prosecuted an appeal from the judgment of the District Court of Muskogee County to the Supreme Court of the State of Oklahoma, and that court, upon a consideration of said appeal on the 8th day of February, 1916, rendered its decision in said cause (Rec. Print. 21), reversing the judgment of the District Court of Muskogee County, Oklahoma; and held that the homesteads of Creek Indians were only exempted from taxation by the laws and treaties of the United States so long as the title thereto remained in the original homesteader. Thereupon the plaintiffs in error and appellants filed in the District Court of Muskogee County, Oklahoma, a dismissal of all that part of their petition which complained of and sought relief from the taxes imposed on said land on account of being irregular, illegal and void for any other reason than that they were illegal and void because prohibited by the contract, constitution, laws

and treaties of the United States (Rec. Print. 37-38).

Thereafter the plaintiffs in error and appellants filed their petition in the Supreme Court of Oklahoma praying a rehearing of the cause (Rec. Print. 30 to 38 inc.), which petition was by the court denied (Rec. Print. 38).

Then the plaintiffs in error and appellants filed their motion in said court asking the court to render and enter final judgment in the cause in that court in order to expedite the proceedings in error and appeal from the judgment of that court to this court (Rec. Print. 39).

Thereupon the court sustained said motion and entered final judgment in said cause in that court reversing the judgment of the District Court of Muskogee County, Oklahoma, and dismissing the action of these plaintiffs in error and appellants (Rec. Print. 40-41).

The judgment and decision of the Supreme Court of Oklahoma in this cause involves the right of the State of Oklahoma, acting through its officers, the defendant in error and appellees in this cause, to impose and collect taxes on the homestead of a Creek Indian allottee and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians domiciled in the State of Oklahoma, before the expiration of twenty-one years from the date of the deed by the United States to the homesteader.

The homestead involved in this cause was deeded to Eliza J. Murphy on the 20th day of April, 1903, and the deed was approved by the Secretary of the Interior of the United States on the 26th day of May, 1903, pursuant to the agreement between the United States and the Tribe or Nation of Indians, of which the grantee in the deed was a member, to the effect that said homestead should be non-taxable for the period of twenty-one years from the date of the deed.

It is the contention of the defendants in error and appellees that the State of Oklahoma has the right to tax this homestead during the period it is exempted from taxation by the treaties, agreement and laws of the United States set forth in the deed; and this right they claim under the terms of the Act of Congress of May 27, 1908 (35 Stats. at Large 312, C. 199).

It is the contention of the plaintiffs in error and appellants that said Act of Congress does not give the State of Oklahoma such authority, but if it did, that then, any such subsequent Act of Congress permitting, or attempting to tax the land described in the homestead deed prior to the expiration of twenty-one years from its date, is an act which impairs the obligation of the contract evidenced by such deed, and is unconstitutional and void for conflict with the Fifth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERRORS.

(Rec. Print. 5, 6, 7.)

First.

The Supreme Court of the State of Oklahoma erred in reversing and overruling the judgment of the District Court of Muskogee County, Oklahoma, which judgment overruled the demurrer interposed by the defendants in error and appellees to the original petition filed in this cause in said court by the plaintiffs in error and appellants; and erred in holding that the land in controversy is subject to taxation by the State of Oklahoma.

Second.

The Supreme Court of Oklahoma erred in holding that the Act of Congress of May 27, 1908, granted the right to Eliza J. Murphy to alienate her homestead upon condition that she first waive and surrender the exemption of the homestead from taxation.

Third.

The Supreme Court of the State of Oklahoma erred in holding that its construction of the Act of May 27, 1908, as set forth in the second as-

signment of error herein, renders the homestead of Eliza J. Murphy subject to taxation by the authorities of the State of Oklahoma; and in holding that under such construction said Act of Congress is constitutional, and constitutionally destroys the previously vested exemption of the land from taxation; because if the Act of May 27, 1908, has the effect to reach back and destroy vested property rights by or through any means whatsoever, whether the means be those of extortion, coercion or reprisal, they would be equally obnoxious to the Constitution of the United States, for that instrument does and will protect the contract between the United States and the Indian homesteader, and the vested property rights thereunder.

Fourth.

The Supreme Court of the State of Oklahoma erred in holding that it and its officers were not estopped from asserting the right of taxation of the land embraced in the homestead of Eliza J. Murphy.

Fifth.

The Supreme Court of the State of Oklahoma erred in holding that it was the intent of the Congress of the United States, at the time the contract of tax exemption was made with the Indian, to provide that in the event of a sale of the exempted land that it should then become

subject to taxation, and that this concealed intent, not expressed or discussed at the time of making the contract, and although contrary to the expressed spirit and purpose of the exemption, confers the power on Congress by later act to express this intent and force it into the provisions and conditions of the prior executed contract.

Sixth.

The Supreme Court of Oklahoma erred in holding that the grantees of the Indian homesteader did not take the land with all the rights, privileges, incidents and exemptions thereunto belonging or in anywise appertaining.

Seventh.

The Supreme Court of the State of Oklahoma erred in overruling the petition of the plaintiffs in error and appellants herein to vacate its judgment and decision rendered and entered in this cause and to grant them a rehearing in said cause.

BRIEF AND ARGUMENT.

(Italics are ours.)

In support of the several assignments of error in this cause, we first observe that the Supreme Court of Oklahoma, in denying the application of the law as announced by this court to be applicable to the facts in this case, apparently rests its decision upon the premise that the purchaser of the exempted Indian homestead having acquired title to the homestead under the authority of the Act of Congress of May 27, 1908, removing the restriction as to alienation of the homestead by the Indian, and providing that the land from which such restriction has been removed shall be subject to taxation, is, by reason of having purchased the homestead from the Indian under the authority conferred on the Indian to alienate the land by that act, thereby estopped to assert that the land is not taxable. But this is a false premise, because there is no privity between the United States and the State of Oklahoma upon which it can invoke such an estoppel, and further, if there was such privity existing, the State of Oklahoma by its constitution has precluded itself from as-

serting any such estoppel. And the premise is principally false for the reason that to impose this condition on the purchaser of necessity imposes the same condition on the homesteader, thereby penalizing him by immediately destroying and depriving him of his vested rights of property (the exemption of his homestead from taxation for twenty-one years), this previously vested property right is a valuable property right, because it gives an increased value to the homestead, and is therefore a part of the property value of the homestead, and it must follow that if the homestead would become immediately taxable in the hands of the purchaser, that the exemption of the homestead from taxation, which exemption gave an increased value to it, would be immediately destroyed, and the homesteader by accepting the opportunity to alienate his homestead under the provision of the act would be compelled to surrender the previously vested property right and the value thereof attached to his land by virtue of the tax exemption, the value of which in Oklahoma, considering the average value of non-mineral lands and the average annual tax rate for twenty-one years, is apparent to the court; and as stated by this court, the purpose and effect of this tax exemption is to add value to the homestead because in the event of sale, upon which alone the question could become material, the value of the homestead would be enhanced,

and that the purchaser stands with respect to the land in the position of the Indian, and that any law destroying the tax exemption is void.

It appears from the homestead deed to Eliza J. Murphy for the tract of land involved in this litigation that it was executed on the 20th day of April, 1903, by P. Porter, principal chief of the Creek Nation, and was approved by the Secretary of the Interior on May 26, 1903, and after describing the land conveyed the deed contains the following provision:

"Subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Eliza J. Murphy; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200)."

The Acts of Congress under which the plaintiffs in error and appellants claim a tax exemption of the land involved are referred to and incorporated in the deed to the homesteader, and thereby became a part of the consideration of the deed as much so as if the Acts of Congress had been set out in the deed in full. The last act that we are referred to in the deed is the Act of Con-

gress approved June 30, 1902 (32 Stats. at Large 503), being an act to ratify and confirm a supplemental agreement with the Creek Tribe or Nation of Indians; and Section 16 of said act provides:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear."

This deed constitutes a contract between the United States and the homesteader, and is based upon the consideration, among others, that the homesteader should relinquish all her rights in the tribal property of the Creek Nation, held jointly with other members of the tribe, and that she would receive an allotment and homestead in severalty, and would abandon the tribal government.

In this connection we refer to a few general principles of constitutional law.

8 Cyc. 930:

"A contract within the Constitution of the United States is one relating to property *or some object of value* which imposes an obligation capable in legal contemplation of being impaired. The constitution embraces all contracts, executed and executory, whether between individuals or between a state and individuals, and a state has no more power to impair an obligation into which she has entered than she has the contracts of individuals. Likewise, compacts between states or between states and the United States are contracts protected by the Constitution of the United States."

8 Cyc. 932, Sub. 4:

"If any subsequent law affect to diminish the duty or to impair the right which the law defines upon the consummation of a contract it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence, *any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, although professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.*"

8 Cyc. 937:

"A legislative grant, being an executed contract, is within the constitutional prohibition."

McCracken v. Hayward, 2 Howard (U. S.) 608; 11 Law Ed. 397-400:

"These laws giving these rights were as perfectly binding on the defendant and as much a part of the contract *as if they had been set forth*

in its stipulations in the very words of the law relating to judgments and execution. If the defendant had made such an agreement as to authorize the sale of his property which should be levied on by the sheriff for such price as should be bid for it, at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff which the constitution made inviolable, and it can make no difference whether such right is conferred by the terms or law of the contract. *Any subsequent law which denies, obstructs or impairs this right by superadding a condition that there shall be no sale for any sum less than the value of the property levied upon, to be ascertained by appraisement or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is a denial of the right.*"

Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379:

"The objection to a law on the ground that it impairs the obligation of a contract does not depend upon the extent of change which a law may make in it."

Rowlett v. Shepherd, 4 La. 86:

"Any law imposing conditions not in the contract when made or dispensing with those that were impairs the obligation of the contract."

8 Cyc. 934:

"A state may agree that certain property, rights or franchises shall be exempted from taxa-

tion or be taxed upon a certain agreed rate, and such an agreement, based on a consideration, is a contract protected by the Federal Constitution."

Montgomery v. Kasson, 16 Cal. 109:

"A contract by the state to convey lands upon the performance of a condition precedent by the grantee creates a contract with parties accepting and partly performing the condition which the legislature cannot take away by repealing the granting act."

Gum v. Berry, 15 Wall. (U. S.) 610, 21 Law Ed. 212:

"An exemption law which withdraws property from the lien of a judgment is unconstitutional and void as it impairs the obligation of a contract."

Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 Law Ed. 498:

"The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that the state may, by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently. *And it is equally well settled that the exemption is presumed to be on sufficient consideration* and binds the state if the charter containing it is accepted."

The State of Oklahoma, by accepting the terms of the Act of Congress of June 16, 1906, as amended March 4, 1907, known as the Enabling Act, and by adopting a constitution through the vote of her people, in accordance with the authority and conditions of that act, thereby ratified and bound herself to an observance of all rights of the Indians within her borders existing by reason of treaties and agreements made by them with the United States, and by such acts has estopped herself to assert an interest in conflict with the rights of the Indians guaranteed them by the United States; and the acceptance of the Enabling Act by Oklahoma is a compact between the United States and the State of Oklahoma, based upon the consideration of the grant of sovereignty by the United States to the state and the obligations assumed by the state under the constitution as a sister state; and the act of Oklahoma in attempting to tax this Indian homestead is a violation of that compact, and in respect thereto this court has said in the case of *Choate v. Trapp,* 224 U. S. 655, 679, 56 Law Ed. 947:

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute."

The provisions of the Act of May 27, 1908, which the Supreme Court of Oklahoma holds estops the grantee of the Indian homesteader from claiming the benefit of the exemption of the land from taxes, has been so repeatedly held void by this court when, and wherever there has been an attempt to give to it the force, effect and application that the Supreme Court of Oklahoma attempts to give it in this case, that it would seem that its effect, construction and application ought to be settled and accepted as settled by the Supreme Court of Oklahoma, for the law involved being a law of the United States and its effect, construction and application when applied to the facts in this case having been fully determined by this court, there would ordinarily seem to be no open question concerning the operation and effect of the act when applied to the facts of this case.

In *Choate v. Trapp,* 224 U. S. 655-697, 56 Law Ed. 947, this court said:

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute. The decree refusing to enjoin the assessment of the taxes on the exempt lands of plaintiffs must therefore be reversed and the case remanded for further proceedings not inconsistent with this opinion."

In *New Jersey v. Wilson,* 7 Cranch (U. S.) 164, 3 Law. Ed. 303, the court said:

"The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of sale, on which alone the question could become material, the value would be enhanced by it. * * * The purchaser succeeded with the assent of the state to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Again, in *Choate v. Trapp, supra,* the court said:

"Choctaw and Chickasaw allotments, under the Atoka Agreement, embodied in the Act of June 28, 1898, under which, in part consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of land in severalty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested rights of exemption from state taxation protected by the United States Constitution, Fifth Amendment, from abrogation during that period as was attempted by the Act of May 27, 1908 (35 Stats. at Large 312, C. 199), removing the restrictions upon alienation and providing that lands from which such restrictions have been removed should be subject to taxation," and in the course of the opinion, at page 946, the court said that the provision that *"all land shall be non-taxable naturally indicates that*

the exemption is attached to the land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee."

Gleason v. White, 224 U. S. 669, 56 Law Ed. 947.

In *English v. Richardson*, 224 U. S. 680, 56 Law Ed. 949, this court said:

"A Creek homestead allottee under an agreement incorporated in congressional legislation by which in part consideration of the relinquishment by the Indians of their claim to tribal property they were to receive homestead allotments which *should be non-taxable* and inalienable *for a specified period, acquired a vested right to exemption from state taxation protected by the Federal Constitution against abrogation by Congress during that period."*

And in the course of the opinion at page 951 the court said:

"The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of the Creek Nation when the tribal lands were divided in pursuance of the same general policy as that discussed in *Choate v. Trapp*, just decided (224 U. S. 665, *ante* 941, 32 Sup. Ct. 565). There were, however, a few differences. The tax exemption covered only the homestead of forty acres and

there was a restriction on alienability for twenty-one years. The patent, instead of being framed in conformity with the agreement, as the case of the Choctaws and Chickasaws bore on its face a provision that the land should be non-taxable; the language of the agreement incorporated in the Act of Congress being that each citizen shall select from his allotment forty acres of land as a homestead which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for said homestead in which this condition shall appear (32 Statutes at Large 503, C. 1323, Sec. 16). These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the constitution on principles stated and applied in *Choate v. Trapp.* The judgment dismissing her complaint is therefore reversed and the case remanded for further proceedings not inconsistent with that opinion."

The Supreme Court of Oklahoma noticed the above cases in its opinion (Rec. Print. 24), but cast them aside because of its opinion that it was not the intent of Congress that its act should have the effect that these decisions state that it did have, and because in its opinion the Act of Congress can be given the effect stated in these decisions that it did have and be constitutional; but in so concluding the Supreme Court of Oklahoma overlooked and failed to consider the case of *Whitmire v. Trapp,* (Okla.) 126 Pac. R. 578, one of its own decisions following and applying the law

as stated by this court in *Choate v. Trapp, supra.* In the Whitmire case the court said:

"Cherokee allottees by virtue of the Cherokee agreement under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of land in severalty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested rights to exemption from state taxation protected by the United States Constitution, Fifth Amendment, from abrogation during that period as was attempted by the Act of May 27, 1908 (35 Stats. at Large 312, C. 399), removing the restrictions upon alienation and providing that lands from which such restrictions had been removed should be subject to taxation."

In *Williams v. Johnson,* 239 U. S. 414, 60 Law Ed. 358, this court said:

"It is conceded by plaintiffs in error that an Act of Congress can supersede a prior treaty, but they insist that it is well settled 'that Congress is without power to change a contract or agreement for a valuable consideration with an individual allottee.' *Choate v. Trapp,* 224 U. S. 665, 56 L. Ed. 941, 32 Sup. Ct. Rep. 565, and *Jones v. Meehan,* 175 U. S. 1, 44 L. Ed. 49, 20 Sup. Ct. Rep. 1, are cited, and incidentally *Marchie Tiger v. Western Invest. Co.,* 221 U. S. 286, 55 L. Ed. 738, 31 Sup. Ct. Rep. 578, and *Mullen v. United States,* 224 U. S. 448, 56 L. Ed. 834, 32 Sup. Ct. Rep. 494. The cases do not apply. It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citi-

zens, and may be exercised as to restrictions upon alienation. *Marchie Tiger v. Western Invest. Co., supra.* Against this ruling *Choate v. Trapp* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an Act of Congress containing a provision 'that the land should be non-taxable' for a limited time; and excluding the application of the Marchie Tiger case, *it was said that exemption from taxation and non-alienability were two separate and distinct objects. And further, one conveyed a right and the other imposed a limitation. The power to do the latter was declared, and it was said 'the right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.'* ''

If we are to infer from the statements of the Supreme Court of Oklahoma, in its opinion concerning the dictum in the case of *New Jersey v. Wilson,* to the effect that, "It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as a sole condition on which a sale of the property should be allowed. But this condition has not been insisted upon." That it intended thereby to hold that this is sufficient authority for the United States in this case to insist upon such a condition upon a sale of the property, and that the United States

has exercised this right by placing the provision in the Act of May 27, 1908, to the effect that in case of a sale of the property it shall become subject to taxation; we are constrained to say that the Honorable Court does not appreciate the force and effect of this dictum, and it misapplies it to the facts in this case. It, of course, would be conceded in this case that the United States at the time of making the contract with the Indians could have insisted on such a provision being placed in the contract with the Indians, and it would have been valid and binding, but the United States did not insist on such a provision being placed in the contract at the time as a part of the consideration thereof, and it cannot now by subsequent legislation force such a condition into the contract. This very thing was indirectly attempted by the Legislature of New Jersey by later repealing the act which confirmed the agreement with the Indians, stating that the land should be non-taxable; and this court adjudged the repealing act which sought to tax the land to be unconstitutional and void. The legislature could not do indirectly that which it could not do directly, nor can the Congress of the United States. It is no argument in support of taxation of these exempted lands to say that the Act of May 27, 1908, does not in terms attempt to repeal the prior act confirming the agreement with the Indians, for it makes no difference whether it

is a direct or implied repeal, and of necessity it is one or the other if it has the effect to reach back and destroy vested rights of property by or through any means whatever, whether the means be those of extortion, coercion or reprisal they would be equally obnoxious to the Constitution of the United States, for that instrument does, and wil, protect this contract and the vested property rights thereunder.

The removal of restrictions as to alienation by a subsequent Act of Congress cannot have the effect of removing restrictions as to taxation vested under a prior act, because the restriction as to taxation is a vested property right.

Williams v. Johnson, 239 U. S. 414, 60 Law Ed. 358. In this case it was said:

"That exemption from taxation and non-alienability were two separate and distinct objects. And further, one conveyed a right and the other imposed a limitation. The power to remove the restriction as to alienation was declared, and it was said that the right to remove such restriction was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right which Congress undoubtedly had the power to grant. That it fully vested in the Indians and was binding upon Oklahoma."

Francis v. Francis, 203 U. S. 233, 51 Law Ed. 165-168. In this case it was said:

"We agree with the State Supreme Court in holding that a title in fee passed by the treaty to the children of Bokowtonden, and that the patent issued in 1827 only located or made definite the boundaries of the tract reserved to them by the treaty. It follows that the words in the patent of 1827, 'but never to be conveyed by them or their heirs without the consent and permission of the President of the United States,' were ineffectual as a restriction upon the power of alienation."

United States v. Paine Lumber Co., 206 U. S. 467, 51 Law Ed. 1142. In this case it was said:

"The restraint upon alienation must not be exaggerated. It does not itself debase the right below a fee simple. *Libby v. Clark,* 118 U. S. 250, 30 L. Ed. 133, 6 Sup. Ct. Rep. 1045."

The State of Oklahoma by accepting the conditions imposed by the Act of Congress exempting this land from taxation for twenty-one years, in adopting a constitution under the provisions of the Enabling Act requiring the observance of this tax exemption, constitutes a compact between the state and the United States to preserve this tax exemption for said period of time, for this exemption is an element of the value of the land, and to destroy the exemption destroys the element in the value of the land.

McGehee v. Mathis, 4 Wall. (U. S.) 143, 19 Law Ed. 314. In this case it was said:

"A grant to a state by the United States upon conditions, and the acceptance of the grant by the state, constitutes a contract, which is binding upon the state, and cannot be violated by its legislation without infringement of the constitution. * * * *The contract of the state to convey the land for the scrip, and to refrain from taxation of the scrip for the time specified was a contract between the state and the original holder and his assigns. Exemption of the lands for which it was receivable from taxation was a principal element in its value; and a repeal of the exemption was the destruction of this element of value. This was clearly an impairment of the contract.*"

In the recent case of *Farmers & Merchants Savings Bank v. Minnesota,* 232 U. S. 516, 58 Law Ed. 707-712, this court again restates its holding, that the tax exemption involved is a vested property right, because it adds value to the exempt property, and that an attempt to tax the property impairs this vested property right and is unconstitutional. And the court further held in this case that the fact that the exempted property (being obligations of the Territory of Oklahoma) had ceased to be obligations of said territory and had passed to and been assumed by the State of Oklahoma, did not in the least alter or change the tax exemption.

We insist that the state is estopped and precluded in this case by the decisions of the Su-

preme Court of the United States in the cases of *Choate v. Trapp* and *English v. Richardson, supra,* because the state by its officers was a party to those cases, and because in those cases the same questions were presented and decided as is presented and decided in this case, and because the exemption involved in those cases and in this one is the same exemption and was granted in the same contract and upon the same consideration and to one of the joint parties to the contract in the same manner and form as was involved in the English-Richardson case, *supra.* As sustaining the estoppel under these state of facts we cite:

Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law Ed. 477-481;

El Reno v. Cleveland T. P. Co., (Okla.) 107 Pac. R. 163, 27 L. R. A. (N. S.) 650-656.

And if the state is not precluded by general principles of the law of estoppel, we assert that it is precluded by its constitution and the provisions of the Enabling Act, as stated in *Choate v. Trapp, supra,* as follows:

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was vested property right which could not be abrogated by statute."

Blue Jackett v. Board of Co. Com'rs., 5 Wall. (U. S.) 737, 18 Law Ed. 667;

M. K. & T. Ry. Co. v. Hancock & Goodbar,
26 Okla. 265, 109 Pac. R. 223.

And if the state is not estopped by its constitution we assert that it is estopped by later act of its legislature exempting these lands from taxation, as follows:

Revised Laws of Oklahoma 1910, Section 7303:

"The following property shall be exempt from taxation: Eighth. Such property as may be exempt by reason of treaty stipulation existing between the Indian and the United States government, or by federal laws, during the force and effect of such treaties or federal laws."

Where a tax exemption has been granted based upon a contract which has been executed, the exemption so granted, can not be changed even in cases where at the time the exemption was granted there was a general law in force providing that all exemptions from taxation should be subject to repeal, modification or amendment.

New Jersey v. Lard, 95 U. S. 111, 24 Law Ed. 352;

The Northwestern University v. People, 99 U. S. 309, 25 Law Ed. 387.

The exemption of the homestead from taxation for twenty-one years, runs with the land and passes to a purchaser, in other words, it is not the Indian that is personally exempted from taxa-

tion, but it is the Indian's land, and the exemption becomes a fixed element in the value of the land and therefore inherent in the grant and tenure of the land and of necessity must pass to a purchaser of the entire estate or fee simple title thereto, and the exemption can not be abrogated without destroying vested property and impairing the obligation under which the title to the property is held.

McGehee v. Mathis, 4 Wall. (U. S.) 143, 18 Law Ed. 314:

"The contract of the state to convey the land for the scrip, and to refrain from taxation of the scrip for the time specified was a contract between the state and the original holder *and his assigns. Exemption of the lands for which it was receivable from taxation, was a principal element in its value; and a repeal of the exemption was the destruction of this element of value. This was clearly an impairment of the contract.*"

Northern Pacific Ry Co. v. Garland, 5 Mont. 187, 3 Pac. R. 134, 155:

"The Act of Congress incorporating plaintiff is a contract between the government and the incorporators, *and their successors,* and it is not within the constitutional power of Congress, or of the territorial legislature to impair the obligation of this contract, which would be done by the imposition of a tax upon plaintiff's right of way by the authority of Congress or the territorial legislature."

Knoxville, etc., Ry. Co. v. Hicks, 9 Baxter (Tenn). 445:

"The exemption from taxation of land passes to a purchaser of the land."

English v. Richardson, 224 U. S. 680, 56 Law Ed. 949:

"A Creek homestead allottee under an agreement incorporated in congressional legislation by which in part consideration of the relinquishment by the Indians of their claim to tribal property they were to receive homestead allottments which should be non-taxable and inalienable for a specified period, *acquired a vested right to exemption from state taxation* protected by the Federal constitution *against abrogation by Congress during that period.*"

Choate v. Trapp, 224 U. S. 665, 56 Law Ed. 946:

"The provision that 'all land shall be non-taxable' *naturally indicates that the exemption is attached to the land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for a limited period, that doubt under this rule must be resolved in favor of the patentee.*"

Williams v. Johnson, 239, U. S. 414, 60 Law Ed. 358:

"Against this ruling *Choate v. Trapp,* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an Act of Congress containing a provision 'that the land should be non-taxable' for a limited time; and excluding the application of the Marchie Tiger case, it was said that 'the *exemption from taxation* and *non-alienability were two separate and distinct objects.*' And further: '*One conveyed a right* and the other *imposed a limitation.*' The power to do the latter was declared, and it was said 'the right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. *But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.*"

Farmers & Merchants Savings Bank v. Minnesota, 232 U. S. 516, 58 Law Ed. 707-712:

"But we are unwilling to intimate a concession that an assumption by the State of Oklahoma of the obligation to pay these bonds, would operate to deprive the bondholders of the exemption from taxation previously enjoyed. Presumably the municipal credit was enhanced and the terms of the municipal borrowing rendered more favorable by the understanding that the bonds, being obligations of an agency of the Federal Government, would be exempt from taxation by the several states. The

value of the bonds in the market was presumably thereby increased. Indeed, the state court in the present case very plainly declares (114 Minn. 109, 130 N. W. 445) that bonds of the municipalities of the territories, if not taxable by the state, command a higher price on the market than bonds of municipalities of the states. *To deprive bonds of the former description of their immunity from state taxation, and this because of the subsequent action of Congress in erecting the territories into a state, with or without an assumption by the new state of the obligations of the former Federal agency, would be in effect to impair the obligation of the contract.*"

New Jersey v. Wilson, 7 Cranch (U. S.) 164, 3 Law Ed. 303:

"The privilege though for the benefit of the Indians, is *annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because in the event of sale, on which alone the question could become material, the value would be enhanced by it.* * * * *The purchaser succeeded with assent of the state to all the rights of the Indians. He stands with respect to this land in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.*"

Blasdel v. Finks, (Okla.) 140 Pac. R. 1178:

"Under section 18 of the Creek Supplemental Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500) the inhibition against the trespass of live stock owned by a non-citizen upon the allotted lands of a citizen and the remedy therefor *runs*

with assent of the stte to all the rights of the such allottee.''

From the opinion page 1179:

''Section 18 of said agreement, which is pertinent here, reads, as follows: 'Cattle so introduced and all other live stock owned or controlled by non-citizens of the Nation shall be kept upon inclosed lands, and if any such cattle or other live stock trespass upon lands allotted to or selected for allotment by any citizen of such Nation, the owner thereof shall, for first trespass, make reparation to the party injured for the true value of the damages he may have sustained, and for every trespass thereafter double damages to be recovered with cost, whether the land upon which trespass is made is inclosed or not.' (Bledsoe's Indian Laws 442.) *In our opinion, this section of this agreement is not susceptible of such interpretation or construction that no benefit may be demanded or action be maintained by any person other than the allottee, and such interpretation or contsruction would deprive the allottee of an element of value in his allottment—the value arising from the ability to transfer his rights to his tenant; and we must hold that the benefits of this section run with the land to tenants of allottees.''*

Gannon v. Johnson, (Okla.) 140 Pac. R. 430:

''The restrictions contained in section 16 of the Supplemental Treaty with the Choctaw and Chickasaw Nations (Act July 1, 1902, c. 1262, 32 Stat. 643) of one, three and five years, upon alienation of surplus lands of allottees, selected during the life of the allottee, *run with the land, and prevent the heirs of a deceased allottee of such land from alienating the same before the expiration of said periods.''*

In re Lands of Five Civilized Tribes, 199 Fed. R. 811;

Goodrum v. Buffalo, 162 Fed. R. 817, 89 C. C. A. 525;

United States v. Oran, 183, Fed. R. 347;

Bridgeman v. Wildcut, 4 Greene (Iowa) 563.

The exemption granted being a vested property right based upon an executed contract, running with the land for the period of twenty-one years, and passing to a purchaser within that period, can not be destroyed by subsequent legislation without violating the obligations of the executed contract.

8 Cyc. 932, sub. 4:

"If any subsequent law effect to diminish the duty or to impair the right which the law defines upon the consummation of a contract it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, although professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

Rowlett v. Shepherd, 4 La. 86:

"Any law imposing conditions not in the contract when made or dispensing with those that were, impairs the obligation of the contract."

Montgomery v. Kasson, 16 Cal. 189;

McCracken v. Hayward, 2 How. (U. S.) 608, 11 Law Ed. 397-400;

Gum v. Berry, 15 Wall. (U. S.) 610, 21 Law Ed. 212;

Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379;

8 Cyc. 937, sub. c.

The case of *Armstrong v. Athens County,* 16 Peters, 281, 10 Law Ed. 965, relied upon by the Supreme Court of Oklahoma to sustain its decision in this cause, is so clearly inapplicable to this case, because it involves a different state of facts, and the application of such different principles of law from those applicable to private citizens under a similar state of facts, that the suggestion of the application of the principles applied in that case to the transaction between private citizens in this case is to say the least revolting to the judicial mind; a statement of the tenure of the lands taxed in that case conclusively demonstrates the impossibility of relying upon the case as an authority for the decision in this case. In that case the land taxed by the State of Ohio, was land granted by the United States in trust for the State of Ohio to be used by it for educational purposes, the state accepted the land grant, and of course the fee simple title thereto was vested in the state or its trustees; thereafter the state established an university in pursuance of the grant and trust, and conveyed the land in trust for the support of the university, and in said act

placed a provision exempting the land thus held in trust from state taxation (which act, however, was unnecessary to exempt the land in the hands of the trustees of the state) thereafter the state concluded to modify the trust and sell the lands to private citizens and apply the proceeds of the sale to the support of the university instead of using the rentals from the land for that purpose, as was being done at that time; and an act of the legislature to this effect was passed directing the sale of the land in fee to citizens indiscriminately except that a preference right of purchase was reserved to the lessees of the land. No tax exemption was granted in the act providing for the sale of the land. So it appears from the statement of the case that the college lands never were at any time subject to taxation, just the same as the school lands granted by the United States to the State of Oklahoma are not subject to taxation.

The state having disposed of the lands without granting a tax exemption to the purchaser, would of course have the right thereafter to tax the land to the same extent that it would have to tax any other public land upon a sale thereof. In speaking of the act of the legislature exempting the university land from taxation in that case Justice Catron said:

"The object of the Incorporating Act of 1804 was to regulate a public fund intrusted to the man-

agement of the State Sovereignty, so as best to accomplish the intention of the donor, the United States. It was a matter of course, in the then state of the college fund to exempt it from taxes, in the hands of the trustees. We think the case in Cranch (referring to *New Jersey v. Wilson*) compared with the one presented by the record, is too dissimilar to require a particular comparison, or further comment."

The exemption from taxation in this case was not given as a bounty or gratuity and therefore does not fall within the bounty cases.

It was clear understanding and agreement of the parties that this land should be non-taxable for the period of twenty-one years, without reference to the future condition of the allottee in respect to being permitted to sell the land and enjoy the proceeds of the sale increased by the exemption from tax burdens, or whether she should continue to enjoy the full income from the land unreduced by taxation.

To hold that the Act of May 27, 1908, subjects this land to taxation upon a sale thereof would prevent the sale of the land for its full value and violate the clear understanding and agreement of the parties.

McGahey v. Virginia, 135 U. S. 696, 34 Law Ed. 316;

Von Hoffman v. Quincey, 4 Wall. 553, 18 Law Ed. 408, 410;

Fletcher v. Peck, 6 Cranch 87, 3 Law Ed. 162.

Respectfully submitted by,

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In the

Supreme Court of the United States

D. N. FINK AND O. J. FLEMING,
TRUSTEES,
Plaintiffs in Error and Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA ET AL.,
Defendants in Error and Appellees.

No. [redacted]43

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

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Defendants in Error and Appellees.

No. 723

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

Since preparing and filing our former briefs, this Court handed down an opinion in case entitled Cornelia Sweet et al. vs. Elmer J. Schock, Treasurer, decided December 10, 1917, which case bears closely upon the questions involved herein, a discussion of which we deem necessary in properly presenting this case.

The last above mentioned case involved the right of the taxing officers of Okmulgee County,

Oklahoma, to tax certain portions of the homestead of a Creek freedman's allotment issued in pursuance of Sec. 16 of the Creek Allotment Act,—the same Act under which the allotment was issued in this present case.

This patent was issued under the same law as the patent in this present case—the same restrictions against alienation of the title; the same "right of exemption from taxation" was incident to the ownership of the allotment at the time the patent was issued.

In the *Sweet* v. *Schock* case a portion of the allotment had been sold and its ownership had passed from the hands of the allottee into the hands of other persons. The status of the title to the lands in the Shock case is identical with the status of the title to the lands involved in this case except in the following particulars:

1. In the Shock case the allottee was a freedman, and in this case the allottee was an Indian of less than one-half blood.

2. In the Schock case the restrictions upon alienation were removed by the order of the Secretary of the Interior under authority of the Act of March 3, 1903, providing for removal of restrictions "for townsite purposes", upon the recommendation of the Commission to the Five Civilized Tribes and the approval thereof by the Secretary. In that case the allottee made a voluntary written application

directed to the Secretary of the Interior for the removal of restrictions. In the present case the restrictions upon alienation were removed by the Act of May 27, 1908 (Sec. 1) and not upon the request or solicitation of the allottee.

These facts mark the difference between the conditions in and about these two titles.

There is no apparent good reason for saying that the first of these two conditions has any bearing whatever upon the application of the law touching the two cases. It matters not whether freedman or Indian citizen happened to be the allottee, the law under which the homestead patent was issued and the terms, limitations and restrictions upon alienation embraced within the respective patents are identical.

So if there be any difference in the application and construction of the laws touching these two titles, that difference must grow out of and be founded in the second subdivision of the above statement, namely, the method by which the restrictions were removed and the conditions attending the removal of the restrictions upon the alienation.

If this premise be well taken and its supporting reasons logical, then there is but one question for us to discuss and but one question for the Court to consider.

Previous to the decision of this Court in the Shock case, this Court had already decided the case of *Choate* v. *Trapp,* (224 U. S. 665), in which the right of Choctaw and Chickasaw Indians who claimed exemption from taxation on their allotted land was involved. In that case there had been no sale or alienation by the allottee, but there had been a removal of the restrictions upon the alienation.

In that case *the State contended* that the Act removing the restrictions also *destroyed the "right or privilege of exemption."* This Court refused that conclusion and held that said lands were *non-taxable by reason of the provisions of the law (Atoka agreement) and the provisions of the patent issued under said law.*

In the *Sweet* v. *Schock* case, decided in December, this Court was dealing with a *Creek title* as is involved in the present case. The provisions of the Creek and Atoka agreements and the language of the patents are almost identical, *and are in effect the same.*

In the *Sweet* v. *Schock* case the State adopted a new theory different from that which had been adopted in the Choate case and contended that although the Act removing the restrictions on alienation did not deprive the Indian of the right to claim the exemption, yet that right ceases as soon as the Indian parts with the title to the land.

The decision in itself seems to have at least to some extent, approved this theory, but with such comment and reasoning as necessarily leads us to conclude that the Court's decision *was induced by the one thing which distinguishes the Shock case from the present case, namely, the fact that the allottee made voluntary application to the Secretary of the Interior for the removal of restrictions upon his allotment under the provisions of the Act of 1903, which was a statute specially designed for the acquisition of lands in the Creek nation for townsite purposes.*

The Court in that case (*Schock* v. *Sweet*) in commenting upon the *Choate* v. *Trapp* case, used the following language:

> "The allotments are different in the case at bar. Sarah Smith invoked a removal of the limitation, the restrictions upon alienation, and could only receive the benefit of the law by accepting the consequences of the law. *It would indeed have been anomalous to give her power to erect a town and convey its lots free from taxation";* (Italics ours).

The Court having in mind the Act of 1903, providing for a removal of restrictions for townsite purposes. It seems to have been the conclusion of the Court that it would be impossible practically to carry out the idea that Congress had, when it passed said Act, if said land thus affected by said Act, should be free from taxation. The idea, of

course, at that time no doubt was to enable communal growth of towns and cities, and assure rapid development of the rich mining and farming regions of that new country.

Thus distinguished from the *Choate* v. *Trapp* case, the Court held that by voluntarily applying for a benefit and privilege which, as the Court said, "was of greater value" than the right of exemption from taxation, that Sarah Smith relinquished the right to claim exemption from taxation.

In *Choate* v. *Trapp* this Court laid down fundamental doctrines which we believe to be controlling in this case.

It must be borne in mind that the only difference between the *Choate* v. *Trapp* case and the present case is in the fact that the lands were in the hands of the original owners in the former case and in the hands of alienees in the present case; and that the *Choate* v. *Trapp* case involved Choctaw-Chickasaw allotments.

The present case deals with Creek allotments but that fact is immaterial under *English* v. *Richardson, Treasurer,* (224 U. S. 680), which held that the doctrine laid down in the Trapp case applied to Creek allottees as well as to Choctaw-Chickasaw allottees.

This Court laid down the particular doctrine in

the *Choate* v. *Trapp* case, as follows, (quoting from the Syllabus):

> "Patents issued in pursuance of statute are to be construed in connection with the statutes and those issued to allottee Indians under the Curtis Act gave the allottees as good a title to the exemption from taxation as to the land itself; and the tax exemption *constituted* property of which the patentees *could not* under the 5th Amendment be deprived without due process of law. * * * * * The tax provisions of the patents to Indian allottees under the Curtis act attached to the land for the limitation period of the exemption."

The decisive and controlling reason for the decision in the *Sweet* v. *Schock* case must necessarily be found in the following portion of said opinion:

> "*State* v. *Wilson,* 7 Cranch. 164 is adduced by plaintiffs in error as sustaining their contention. That case passed upon the grant of the State of New Jersey to certain Indians, with the privilege of exemption from taxation. It was decided that the privilege, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, not to their persons. And this was an advantage to the Indians, it was said, *because in the event of sale, on which alone the question could become material, the value would be enhanced by it, but it was further said it was not doubted that the State might have insisted on the surrender of the privilege as the sole condition on which a sale of the property should be allowed. Such condition is imposed*

by the acts of Congress which we have mentioned, when voluntarily invoked by an allottee; and there is no hardship in this. The *right or privilege of exemption from taxation can not be taken from the allottees' land while he retains the title.* Its surrender may not be forced from him, *but he may yield it in bargain for another right or privilege;* and any improvident estimate of the right to be given up or to be received is guarded against by the requirement of the approval by the Commission to the Five Civilized Tribes and the Secretary of the Interior, *and it can easily be seen that if exemption from taxation gave value to the land, the power to constitute towns was of greater value."* (Italics ours.)

By necessary implication, it seems, that the Court in the *Sweet* v. *Shock* case would have rendered a different decision if the restriction upon alienation had been voluntarily removed by Congress instead of by the Secretary of the Interior under the provisions of the Act of March, 1903, upon the application of the allottee.

In other words, the allottee in principle must become a *party voluntarily to the conditions thus imposed,* expressly or by implication *and his voluntary application for the removal for townsite purposes by all rules of fair construction might seem to have contemplated a relinquishment of his right to claim exemption from taxation.*

And it must further be conclusively within the mind of the Court when that decision was rendered

that for the surrender of this privilege and this property right *a valuable and an adequate consideration must pass* as was shown in the *Sweet* v. *Schock* case, and to pass in lieu of and as a *consideration for the surrender* of his valuable right of exemption from taxation.

Applying this doctrine to the present case, the State has failed to show:

FIRST: A VOLUNTARY SURRENDER OF THE PRIVILEGE;

AND, SECONDLY: A VALUABLE OR AN ADEQUATE CONSIDERATION FOR ITS RELEASE AND SURRENDER.

We are now brought face to face with the question as to whether the provisions of Sec. 4 of the Act of May 27, 1903, imposes a condition upon the allottee whose lands were freed from restrictions by Sec. 1 of said Act, and whether such condition thus imposed, if there be such condition imposed, amounts to a voluntary surrender and release of a valuable property right for a valuable consideration or an adequate consideration when he conveys said lands.

The whole contention of the State fails in this case if the provisions of Sec. 4, which reads as follows,

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though

> it was property of other persons than allottees of the Five Civilized Tribes"

do not amount to the test which is made in the *Sweet* v. *Schock* decision.

In other words, does it expressly impose such a condition upon the Creek homesteads which were already by express statute and by the provisions of the patents free from taxation?

Does this language forewarn a Creek homestead owner whose lands were freed from restriction by Sec. 1 that a sale by him of said land will amount to a voluntary relinquishment of a valuable right, that is, the right of exemption from taxation?

Whether this law embraces within its provisions a method and means whereby a valuable consideration shall have passed to the Indian for and in lieu of his surrender of the right of exemption from taxation?

Even on the extreme contention of the State all of these things must appear before this case can come within the provisions of the case of *Sweet* v. *Schock*.

It needs no argument to show that no valuable right or consideration was so given by Congress to the owner of a Creek homestead as a consideration for the release and surrender of his right of exemption from taxation.

THE ACT OF 1908 WAS A VOLUNTARY REMOVAL OF RESTRICTIONS BY CONGRESS.

Exemption from taxation is a valuable right and when that attaches to the land itself, it, in the very nature of things, add much to its value.

Of course this value is inseparable from the idea of alienability—as on that alone could this consideration arise, and it being inseparable from the land itself ,its value therefore is a relative one, depending upon the right of alienation.

It is claimed by the state that the right to alienate is a valuable right. Inherently it is of great value, but the value of that right also is a relative value depending upon freedom of the right to alienate.

If the right to alienate is beset by conditions and limitations which are onerous and burdensome, then it ceases to be a valuable right.

The naked right to alienate, classed as a political or altruistic right as distinguished from a property right, could not be a valuable consideration for the surrender of a property right measured in dollars and cents.

In the *Sweet* v. *Schock* case the sense in which the right to alienate was used was that it was of a money value and not merely a political or altruistic value.

In that case the actual value in dollars and cents of this townsite property was a vital and material factor in determining whether there was any "greater consideration" for the surrender of the right of exemption from taxation.

If the conditions upon which the restrictions are removed (as claimed by the State) be such as to, in effect, take away, rather than add to the value of the land—then can it be said that the granting of the right to alienate these lands was a valuable right?

Most certainly not.

Under the circumstances of general Creek allotments it must be borne in mind that this was a voluntary removal of restrcition by Congress without regard to the will or judgment or the desire of the Creek allotment owner.

It must be borne in mind, also, that the right of exemption from taxation added most materially to the value of Creek homesteads and that this law did not have in contemplation, when it was passed, the creation of a condition whereby cities or towns might be builded, or that circumstances adding special values to the property might be in view, and that it was the general right applying to all Indians of the entrie Five Civilized Tribes within the classes mentioned in Sec. 1 of the Act of 1908.

So it cannot be said in this case, as was said in the case of *Sweet* v. *Schock*, that in exchange for this surrender he was given a greater value, to-wit, the privilege and opportunity of selling for townsite purposes the land at greatly enhanced prices over the values of the general Creek homestead and freighted with the inevitable condition that a townsite cannot exist as such if free from taxation.

There was no voluntary action on the part of the allottee; there was no valuable consideration in exchange for surrender of this right, and therefore the decision in *Schock* v. *Sweet* cannot have a proper application as controlling this case.

AS TO THE CONSTRUCTION OF THE LAW—WHAT DID CONGRESS MEAN?

Further than that we call the Court's attention to our authorities cited in our reply brief on pages 4 and 5, which lays down the doctrine that a subsequent general statute cannot repeal or affect a prior specific act pertaining to the same subject matter. There is no specific reference in Sec. 4 to the conditions imposed in the allotment Act or in the exemption of the lands from taxation.

It is contrary to all rules of construction to apply this general law to the specific provisions of the Creek allotment Act.

Under *Choate* v. *Trapp* a vested right attached to the exemption from taxation and was inseparable

from the land and title thereto. Its divestiture and surrender can not be made upon any doubtful statute or any implied law.

Indeed it can not be divested by law at all, but can only be divested by the voluntary act of the owner of it.

If, by divesting this land of its element of non-taxability merely by the conveyance thereof, then the law amounts to confiscation of a part of the title and violates the rule of *Choate* v. *Trapp.* On page 11 of our reply brief we quote from *Choate* v. *Trapp* the rule that all doubt, in construction, of doubtful expressions, in this Act of Congress and in the provisions of the patents, must be resolved in favor of the Indian; a rule so long recognized as to need no late day support; and there can be no successful contention made in this case under these rules of decision and construction that merely conveying his title after it was freed from restriction under the Act, amounts to a voluntary surrender of the property right of exemption.

The defendant in error takes the particular ground that the provisions of the Act of April 26, 1906, which reads as follows:

> "*Provided* further that all lands upon which restrictions are removed shall be subject to taxation and *the other lands* shall be exempt from taxation as long as the title remains in the original allottee;"

And the provisions of the Act of 1908 (Sec. 4) which reads as follows:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes,"

constitute that necessary condition upon which the restrictions were removed as to bring it within the rule suggested in *State* v. *Wilson.* The Court's attention is called to the fact that *State* v. *Wilson* suggested that:

> "it was not doubted that the State might insist on the surrender of a privilege as the *sole* condition on which a sale of the property could be allowed."

It would be impossible to construe the laws as quoted, the acts of 1906 and 1908, as coming within that suggestion.

In the first place the Act of 1906, which reads,

> "providing further that all lands on which restrictions are removed shall be subject to taxation"

could not be construed in any sense as a condition imposed upon the sale of this particular or any other lands before the restriction had been removed, *Choate* v. *Trapp* holding that the Creek homestead was non-taxable—notwithstanding this Act.

And the words,

> "The other lands shall be exempt from taxation as long as the title remains in the original allottee"

could in no sense apply to any land after the restrictions had actually been removed, as the words "other lands" evidently was meant to embrace all of that class of lands which were still within the restriction upon alienation so that the reason furnished by the Act of 1906 utterly fails to impose a condition precedent upon these particular lands, because they were already exemp from taxation by prior legislation and by the patent itself, and evidently this statute was not intended to have any application whatever to Creek homesteads unless restrictions thereon had been removed under the Act of 1903 with the approval of the Secretary.

And Sec. 4 of the Act of 1908, which reads

> "that all lands from which restrictions have been or shall be removed, shall be subject to taxation, and all other civil burdens as if it were property of other persons than allottees of the Five Civilized Tribes,"

does not specifically define a condition precedent upon the class of Creek homestead allotments from which restriction had by that Act been removed, for the Act did not in any sense attempt to define such a condition precedent nor suggest that as a "*sole condition*" the allottee might take advantage

of the provisions of Sec. 1. So we say by every rule of decision and construction the doctrine laid down in *Sweet* v. *Schock* is not controlling in this case at bar. It may be urged that these particular lands are now embraced within the townsite of Muskogee, but the restrictions were not removed for townsite purposes and the lands were not at that time considered as a subject of legislation for townsite purposes; no application of the owner was ever made for the removal of the restrictions for such purposes and they were not townsite lands when the allottee held them, and sold them.

They were like all other allotted lands in the Creek nation without the class which came within the provisions of the Act of 1903, known as townsites and thus provided for by special legislation.

Computing 21 years from the date of the patent in this case, as in practically all of the Creek homestead allotment patents, many years were to elapse from the date of the Act of 1908 before the 21-year period should expire, many years were to pass after the conveyance of this land to the original allottees; the common sense view of these patents and the laws exempting the lands from taxation gave them special value in the eyes of purchasers, which would have at that time enhanced their market value most materially.

To say that the Indian may claim exemption under these laws so long as he holds the lands is

not adding a valuable element to the land, but is exempting the individual Indian from a special tax burden.

The fundamental doctrine laid down in *Choate* v. *Trapp* connects the title of the land inseparably to this added value, because of its non-taxable character, and as is so well said by this Court in the Trapp case, and by this Court in the *Sweet* v. *Schock* case, and well said by *State* v. *Wilson,* the original case,

> "because in the event of sale on which *alone the question could become material* the value would be enhanced by it."

It was that material value that was contemplated in *Choate* v. *Trapp* as being an inseparable value and right attached to the property. The mere non-taxable character of this land so long as it remains in the hands of the Indian is not an inseparable value connected with the land, but is an exemption of the Indian from a tax upon the land and goes to a matter of income rather than to the corpus of the property.

It is contended that it was the policy of Congress that these lands were to remain exempt from taxation for the benefit of the Indian, to prevent a sale of his lands for taxation—and it is upon this alleged policy that the state now bases its major claim in this action.

But it must be borne in mind that the intent that the lands were to remain exempt from taxation "for the benefit of the Indian" *was not evidenced solely* by the exemption provision in the patent—it was also provided in both the treaty and patent that the lands were to be and remain inalienable and free from any encumbrance whatever for twenty-one years from the date of the patent; this clause alone would have prevented any sale for taxes.

The effect of such a construction as is contended for by the defendants in error in this case would be to say that Congress had removed the restrictions and given the Indian the right to sell, but that the instant he sold he sacrificed a goodly percentage of the actual value of the property, for its value as an asset is determined by its relative worth to purchasers.

CONCLUSION.

Under *Choate* v. *Trapp* these lands were non-taxable after the removal of the restrictions upon alienation.

If they became taxable after the removal of the restrictions, it must be as a result of a voluntary surrender of the non-taxable feature of the title, by the allottee.

It is settled that there was no voluntary surrender of this right in this case—and there was

no surrender at all, unless it was by operation of the law and a condition of the law.

There is no express condition in the law, and if any exists it must be an implied one and it must operate by virtue of its own force and not by virtue of any act of the allottee.

The object and purpose of the Act of 1908 was to render the lands alienable by the allottee. If there was any implied condition in the law it was without the consent of the allottee. If the allottee proceeded to carry out the purpose and intent of the law—and sell the lands—then by this alleged implied condition the law attempts to divest, without consideration and without his consent, a valuable property right in the land—and to that extent violates the rule laid down in *Choate* v. *Trapp*.

This law, unlike the Act of 1903, itself removes the restrictions upon alienation without regard to the will or wish of the Indian, while under the Act of 1903 the Indian invoked the operation of the law and the Department, which resulted in the removal of the restriction upon alienation, and the INDIAN AND NOT THE LAW WAS THE REAL AND CONCLUSIVE AGENCY WHEREBY THE RELEASE AND SURRENDER OF THE RIGHT OF EXEMPTION WAS MADE.

NO ACT OF CONGRESS, UNAIDED BY THE PRIOR AND VOLUNTARY ACT OF THE INDIAN, COULD EVER DIVEST THE RIGHT OF EXEMPTION OF THESE LANDS FROM TAX-

ATION—CONGRESS DID NOT POSSESS SUCH POWER EVEN HAD IT EXPRESSLY ATTEMPTED TO DO SO.

There was not in this case and never could be in any except townsite removal cases, any valuable consideration for the surrender of the tax exemption right by the allottee. There is a total lack of voluntary action on the part of the Indian to make surrender of the right and also of valuable consideration for such surrender, both of which elements were the basis upon which the decision in *Sweet* v. *Schock* was made.

The state has no right to tax these lands nor any Creek homestead lands of similar class during the exemption period, whether in the hands of the original allottees or his direct or remote grantees, or his heirs or their grantees, and plaintiffs in error herein ask judgment accordingly, overruling the decision of the Supreme Court of Oklahoma and by due mandate correct the record accordingly.

Respectfully submitted,

W. O. CROMWELL,
GEORGE W. BUCKNER,
CHARLES B. ROGERS,
Counsel and Solicitors for Plaintiffs in Error and Appellants.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1916

D. N. FINK and O. J. FLEMING, TRUSTEES,
Plaintiffs in Error and Appellants

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.,
Defendants in Error and Appellees.

No. 723

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF

For reply to the argument and Brief of authorities cited by defendants in error and appellees in their Brief herein, plaintiffs in error and appellants further show the Court:

That the defendants in error while admitting the law to be that so long as the title of the homestead of the Creek allottee remains in him, and before the title is alienated, that said lands are all nontaxable; yet they contend that the said exemption from taxation ceases immediately said lands are alienated by said allottee.

Now—the primary contention is made that the provisions of Section 4, of the Act of May 27, 1908, to-wit:

> "..... provided, that all land from which restrictions have been made or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes,"

amount to a declaration by Congress that the owner of any Creek Homestead who desires or might desire to sell the same might do so by him and the purchaser thereof waiving the already existing "right of exemption" which belonged to and was in fact a part of the land and title to the homestead.

There is no contention that said Act expressly makes a provision amounting to the above, but that by "fair and necessary" implication it does so make said statement.

It is intimated in New Jersey vs. Wilson, that where the restrictions remained upon the power of the Indians to alienate, and the lands were by the Act granting the title, exempted from taxation and civil burdens, that as the sole condition upon which power to alienate might be given the Indians, they were to release and relinquish the right to exemption, might be insisted upon by the State of New Jersey. If the State of New Jersey had so intended to insist upon such a condition attached to the grant of the power to alienate, then it certainly would have set it forth specifically in the grant of the power to alienate. In other words, by plain

language, such conditions would have been attached to the grant of the power to alienate and would have been a condition precedent to the exercise of the power. But in the absence of such specific condition being in the Act granting the power, how can it be said that such condition was intended?

The first Section of the Act of May 27, 1908 contains an unqualified removal of the restriction upon the alienation of Homesteads of all Creeks of less than half Indian blood. Not one word appears as a condition to that grant of power or that removal of restriction—but homesteads of Creeks constituted only a very small part of the body of lands from which that section removed the restrictions.

No other Section of the Act of May 27, 1908, made any specific reference to the "exemption from taxes of Creek Homesteads" or other specific lands which had been by treaty made exempt from taxes for any definite period.

Section Four provided that all lands from which restriction had been removed by the Act were to be subject to taxation the same as the lands of persons who were not allottees.

Now the provisions of both the First and Fourth Sections were so general that neither Section made any specific mention of the exemption from taxation of homesteads of the Creek

Nation or of any other Nation— in fact, no mention was made except in general terms about any lands being subject to taxation. There were other classes of land in all the Five Tribes, which previous to the passage of that Act had been considered free from any taxes, but not because of any special exemption granted in the patent and reserved in the Treaty.

So that if there were any lands in the Five Tribes which by special grant and restriction in the Treaty made them exempt from taxation for any specific season or term, then said general Act had no application thereto according to the general rules for constructing statutes and treaties.

Any subsequent Act which sought to create a condition by which said exemptions were to be destroyed or waived would be in the nature of an Act repealing a former statute or grant of right, and would come within the general rules of construction applicable to such statutes.

We believe that the rule of construction as laid down by Mr. Sedgwick in his work on Statutory and Constitutional Law, on Page 123, is applicable here:

> "In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule that a general statute without negative words will not

repeal the particular provision of a former one, as for instance, the Statute Elizabeth, 5 C. 4., that none shall use a tray without being an apprentice did not take away the previous statute 4 and 5, Phillip and Mary, C 5., declaring that no weaver shall use, etc., the reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of the subject, and has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all."

Again on Page 124:

"It has been said that, even if there be negative words in the latter statute, it shall not be considered as a repeal of the former provided they can both reasonably stand together."

And again on Page 127:

"So in this country, on the same principle it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favorable; on

the contrary, Courts are bounds to uphold the prior law if the two acts may well subsist together."

Under these rules it is quite clear that the legislation of Congress as shown in Sections 1 and 4 of the Act of May 27, 1908 did not refer and had no application to the provisions of the Creek Treaty (both original and Supplemental) making Creek Homesteads exempt from taxation.

The treaties and the patents issued thereon vested the Indian with absolute rights of property (See Choate vs. Trapp) which could not be divested without his consent duly and solemnly given.

This right was not personal but attached to the land. (See Choate vs. Trapp supra.)

Any act short of a solemn grant or conveyance by him could not divest him of this property.

If the Act had made a special provision that he might convey his homestead upon his waiving and releasing his claim and "that his conveyance of said lands herein shall constitute a waiver and avoidance of the right to exemption of said property from taxation," it might be that his solemn act conveying said lands amounted, under the conditions imposed to equally a solemn release and conveyance

to the state of the right of exemption of said property. But could anything short of either such a provision as above or else a legislative recital that in consideration of the release and waiver of such right of exemption the Indians were therein granted the right to alienate their homesteads, ever amount to a solemn release and waiver of such right of property.

We believe that under no rule of construction can the Act of 1908 be constructed to be a legislative declaration of a condition precedent to a sale that such waiver and release were agreed to and that a sale would amount to such a conveyance to the State.

It must be admitted that the owner of the title would have to be a party to the compact if such a condition were to operate to divest him of his title and right to the exemption.

Recognizing the value of the right to exemption, does it seem possible that Congress would have attempted to impose upon the Indian and his land a condition that, before he could sell his land he must first agree to a compact which would denude his land of a large part of its value and worth?

It would naturally be the intent of Congress to aid the Indian in receiving for his land the highest possible price.

If to impose a condition upon the sale which would render the land very much less valuable before the power to alienate were granted — then it seems that Congress has done that which it did not really intend to do, and naturally would not do.

The Act intended to liberate the lands from restriction, and by that means to aid the Indian in receiving a *greater value* from them—and it seems that Congress would not do that which would tend to defeat the primary object of the legislation—as the imposition of such a condition would inevitably do.

The Act was not intended to apply (Section 4) to Creek Homesteads, within the twenty-one year period.

If the right to exemption was real estate and a vested right in land, then the Indian could alienate it to any person.

It was a fixed and certain right adding value and estate to the allottees share of the Tribal property.

If the State could not divest that right or limit or modify that estate by reducing the term of years of exemption, or by re-

ducing the area of the allotment, while in the hands of the Indian, then how can it be said that the State can do that after the Indian has sold the same?

The Supreme Court of the United States in the Choate case say that the property right in exemption from taxation was given and granted by the Treaty and Patent "in consideration of the release of the Indian's claim to all of the balance of the Tribual lands."

If this be true, then certainly that right cannot be questioned by the Creek Nation, the United States Government upon the issuance of the patent and the State of Oklahoma under the Schedule of the Constitution.

There was never any demand made by the Creek citizen for the right to alienate his land (homestead)—there is no evidence that he was even a party by request for such legislation.

There is no record that he ever agreed to waive the right of exemption in consideration of the right to sell his homestead.

No one ever before claimed such a construction of the Act of 1908. (Section. 4).

The State never claimed this when the Choate case was briefed and argued, and that was not one of the defenses in the Choate

case for the right of the State to tax the lands.

It was then claimed that the provision in the Treaty, both Original and Supplemental exempting the Homestead from taxation was merely to prevent sales for taxes and to avoid that species of alienation.

That theory was exploded by this Court in that case.

It is equally true now that if Congress intended that by a sale under the provisions of the Act of 1908, the Indian waived and forfeited the element of "exemption" in his homestead, and that by reason of that fact a sale operated to bring the lands within the power of the State to tax, then what can be said of a sale upon execution by a Sheriff?

Wherein does it appear that there could ever be any distinction or difference in applying this law to the sale by the Indian and a sale on execution, after restrictions have been removed? No such difference can be made in its application.

Section 1, of the Act of 1908, plainly removed all restriction from the sale of the Homestead. Section 4 made all lands from which restriction had been removed subject to taxation; subject, however, to the construction under the rules above given.

This legislation must be constructed so as to favor the Indian.

Thus in Choate vs. Trapp (946 L. Ed.) the Court said:

> "But in the Government's dealings with the Indians, the rule is exactly the contrary. The construction instead of being strict is liberal; doubtful, expressions insted of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people, who are wards of the Nation and dependant wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

If the construction placed upon the Act of 1908 were given force and effect as contended for by defendants in error, it would divest the Indian of a large portion of the value of his homestead and make him weaker and less helpful. It would violate the universal rule that has always been applied in constructing Indian legislation and favor the strong and powerful against the weak and helpless Indian.

If such a construction could be placed upon the Act of 1908, it would place the Indian in the position of surrendering a large portion of his estate for the mere privelege

of selling what is left of it. Congress never intended to so place him. Just the opposite is what Congress would naturally do in the premises.

For the reasons assigned in our first brief and this brief as above, we ask a reversal of the opinion and judgment of the Supreme Court of Oklahoma, in this case.

Respectfully submitted,

W. O. Cromwell,
Charles B. Rogers,
Geo. W. Buckner,
Counsel and Solicitors for Plaintif's in Error and Appellants.

No. [redacted]

In the

Supreme Court of the United States

October Term, 1916.

D. N. FINK, O. J. FLEMING, as Trustees for W. O. Cromwell and J. L. Cromwell and All Persons Holding Contracts for Lots in Cromwell Heights Addition, Muskogee, Oklahoma, as Their Interest Appears, Plaintiffs in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, and W. H. WAINRIGHT, as County Treasurer of Muskogee County, Oklahoma, ... Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

EDMUND LAUGHLIN,
Amicus Curiae.

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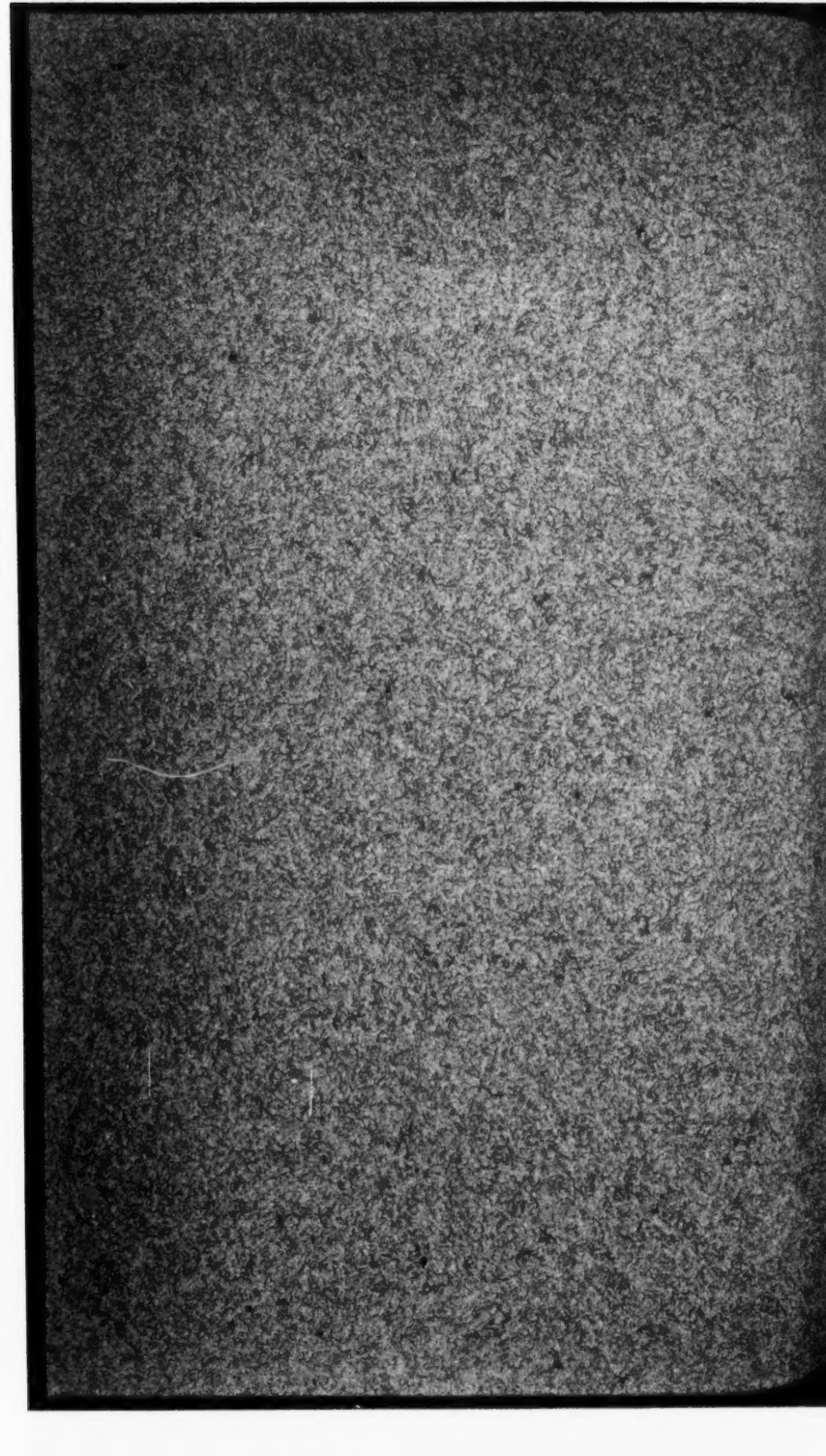

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In the

Supreme Court of the United States

October Term, 1916.

No. 723.

D. N. FINK, O. J. FLEMING, as Trustees for W. O. Cromwell and J. I. Cromwell and All Persons Holding Contracts for Lots in Cromwell Heights Addition, Muskogee, Oklahoma, as Their Interest Appears, Plaintiffs in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, and W. H. WAINRIGHT, as County Treasurer of Muskogee County, Oklahoma, - - - - Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief and Argument of Mr. Edmund Lashley, Amicus Curiae.

PREFACE.

This brief is submitted with the consent of the Court and counsel for the plaintiffs in error, at the request of clients interested in the question involved. May it please the Court:

STATEMENT OF THE CASE.

This is a suit in equity, instituted by the plaintiffs in error to resist the collection by defendants in error of any taxes upon certain lots in Cromwell Heights addition to the City of Muskogee, Oklahoma, which are a part of lands allotted as a homestead to Eliza J. Murphy, a member of the Creek Tribe of Indians, and of which plaintiffs in error are the purchasers. From an order overruling a demurrer to the petition in the trial court, an appeal was taken to the Supreme Court of the State of Oklahoma, which court reversed the ruling of the trial court and directed it to sustain the demurrer. From this judgment of the Supreme Court of Oklahoma, the case is brought on a writ of error to this Court.

The facts disclosed by the record are set out in the briefs of counsel in the case. Briefly they are; that on the 20th day of April, 1903, the United States patented to Eliza J. Murphy, a citizen and member of the Creek Tribe of Indians, the lots in question, as part of the lands set apart to her as her homestead allotment; that this deed was approved by the Secretary of the Interior of the United States on the 26th day of May, 1903, and was made in conformity with, and pursuant to, the treaties then existing between the Creek Tribe or Nation and the Acts of Congress of the United States, applicable

thereto and containing a provision that said homestead shall be non-taxable and inalienable and free from any incumbrances whatever for twenty-one years from the date of said deed. Some time after the Act of Congress of May 27, 1908, had become effective, said Eliza J. Murphy conveyed the lands in question to the plaintiffs in error. In the year 1911, the taxing authorities of Muskogee County, Oklahoma, where said lands are situated, made an assessment thereon and were taking steps to collect the taxes so assessed, when plaintiffs in error filed their petition for an injunction to restrain said authorities from collecting any taxes thereon. The petition set out various grounds for the injunction to all of which defendants in error filed their demurrer. It seems, however, that the only question urged on the demurrer was whether or not these lands were, by reason of the treaties between the United States and the Creek Nation of Indians and the Acts of Congress affecting the property rights of the Creek Tribe of Indians and the members thereof, exempt from all forms of taxation. On this ground, the trial court overruled the demurrer, holding in effect that said lands were so exempt, and the Supreme Court of Oklahoma in reversing the trial court, held in effect that the exemption, as contended for by plaintiffs in error, did not exist. It appears from the record that the conveyances from Eliza J. Murphy to the plaintiffs in error, were made by virtue of the provisions of the Act of Congress of

May 27, 1908. The exact question to be decided is, whether lands originally constituting the homestead allotment of a Creek Indian, and made alienable by the Act of Congress of May 27, 1908, is taxable in the hands of the grantee of said allottee before the expiration of twenty-one years from the date when the United States executed and delivered its deed for the same to said allottee.

An exposition of the errors complained of is set out in the brief of plaintiffs in error, they all however involve the single question, whether the lands were, at the time of the attempted assessment and collection of taxes, exempt from all forms of taxation.

BRIEF AND ARGUMENT.

The facts in this case are very simple and not disputed. The correct result may be reached by a determination of the correctness of the following fundamental propositions:

First.

The lands involved would have been exempt from taxation had the title to such lands been at the time of the attempted taxation in the original allottee.

Second.

If these lands would have been at the time of the attempted taxation, exempt from such taxation,

title to the same standing in the allottee, did the act of alienating said lands did not operate to deprive the grantee of the allottee of this exemption.

We turn to the first question: In the beginning we wish to point out that the question as to the existence of this tax exemption is one solely of Federal law and the fact that this land is now situated within the State of Oklahoma has in no wise affected this condition.

Section One of the Enabling Act of the State of Oklahoma is as follows:

"The authority of the United States over the persons and property of Indians and their rights unimpaired—*provided,* that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished), or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians and their lands, property or other rights by treaties, agreement, law, or otherwise which it would have been competent to make if this act had never been passed." Williams Constitution and Enabling Act of Oklahoma, p. 241.

Section Twenty-two of the same Act provides, "that the Constitutional Convention provided for herein, shall, by ordinance irrevocable accept the terms and conditions of this act."

The Constitutional Convention sitting for the purpose of framing the basic law of the State of Oklahoma accepted the terms and conditions of the Enabling Act in the following language:

"Acceptance of the Terms of Enaabling Act:—

Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States entitled, 'An Act to enable the People of Oklahoma and Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the Original States. * * *"

Williams Constitution and Enabling Act of Oklahoma, p. 238.

In Section Three of Article One of the Oklahoma State Constitution is found the following provision: "The people inhabiting the State do agree and declare that they forever disclaim all right and title in and to all lands lying within said limits owned or held by any Indian Tribe or Nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

Section One of Article Twenty-five provides that, "No existing rights, actions, suits, proceedings,

contracts or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place."

Furthermore, the legislature of Oklahoma has recognized this exemption.

Paragraph Eight of Section 7303 of the Revised Laws of Oklahoma of 1910, exempts from taxation, "such property as may be exempt by reason of treaty stipulations existing between the Indian and the United States Government or by Federal laws during the force and effect of such treaties or Federal laws."

In view of these provisions, it will readily be seen that the question as to the existence and duration of this exemption is purely one of Federal law.

The allotment in question was made under the authority of the Original Creek Treaty, 31 Stat. L. 861, as modified by the Supplemental Creek Treaty, 32 Stat. L. 500. Section Seven of the Original Creek Treaty contains, among others, the following provisions:

> "Land allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation, contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before

the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment, forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above."

In Section Sixteen of the Supplemental Creek Treaty, the provision for the allotment of homesteads is as follows:

"Each citizen shall select from his allotment, forty acres of land, or a quarter of a quarter section, as a homestead which shall be and remain non-taxable, inalienable and free from any incumbrances whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons who cannot select for themselves may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen, it shall be the duty of said commission to make selection for him. The homestead of each citizen shall remain after the death of the allottee for the use and support of children born after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and if

> this be not done the land embraced in his homestead shall descend to his heirs free from such limitation, according to the laws of descent and distribution, herein otherwise prescribed."

Section Four of the Act of Congress of May 27, 1908, 35 Stat. L. 312, is as follows:

> "That all land from which restrictions have been or shall be removed, shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes; provided that allotted lands shall not be subjected or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

It is contended by defendants in error that this section of the Act of Congress of May 27, 1908, authorized the imposition of taxes in the instant case.

First let us confine ourselves to the supposition that title to these lands still remained in the allottee. That in such event these lands would not be subject to taxation until the expiration of the twenty-one-year period specified in the Original and Supplemental Creek Treaties and embodied in the grant to the allottee, is no longer open to question in this Court. On this point, the cases of *Choate v. Trapp*, 224 U. S. 655, 56 L. Ed. 941; *Gleason v. Wood*, 224 U. S. 669, 56 L. Ed. 947, and *English v. Richardson*, 224 U. S. 680, 56 L. Ed. 949, are decisive.

In *Choate v. Trapp,* the facts were that certain Choctaw and Chickasaw Indians, under the terms of the Atoka Agreement imposed in the Act of Congress of June 28, 1898, and commonly called the Curtis Act, received in consideration of the relinquishment by them of all their claims to tribal property, certain allotments of land in severalty, which by the terms of said Act of Congress, were to be non-taxable while the title remained in the original allottee, for not to exceed twenty-one years from the date of the issuance of the patent. The Act of May 27, 1908, removed the restrictions upon alienation of these allotments and provided that "all lands from which such restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes," thereupon the State of Oklahoma instituted proceedings for the purpose of assessing said lands for taxes. The Indians sought to enjoin these proceedings but their complaint was dismissed on demurrer, the case was appealed to the Supreme Court of Oklahoma which held that Oklahoma was not a party to any contract with the Indians; that the United States by virtue of its governmental power over the Indians could have instituted title in severalty for ownership in common without plaintiff's consent and that for want of a consideration, the provision that the land should be non-taxable was not a contract but a mere gratuity which could be withdrawn at will. Accord-

ingly that court overruled plaintiff's contention that they had a vested right of exemption which prevented the State from taxing the land at that time, and dismissed their suit. The case was carried on a writ of error to this Court, which held that the Act of June 28, 1898, created a tax exemption and not a mere additional safeguard against alienation which would fall when the restrictions on alienation were removed; that the allottees under that act acquired a vested right of exemption from State taxation, protected by the Fifth Amendment of the Constitution of the United States from abrogation during the period specified and that Congress had no power to abrogate this vested right of exemption.

The facts in *Gleason v. Wood* were similar to those in *Choate* v. *Trapp* and involved the same question and the Court followed its ruling in the former case.

The facts in *English* v. *Richardson* are identical with those in the case at bar on the supposition we have made that title still remained in the allottee, Eliza J. Murphy. The Court held the homestead exempt from taxation on the authority of *Choate* v. *Trapp.* Mr. Justice Lamar delivered the opinion of the Court in these three cases. In the case of *English* v. *Richardson,* he employs the following language:

> "The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of

the Creek Nation when the tribal lands were divided in pursuance of the same general policy as that discussed in *Choate* v. *Trapp*, just decided. There were, however, a few differences. The tax exemption covered only the homestead of forty acres and there was a restriction on alienability for twenty-one years. The patent instead of being 'framed in conformity with the agreement,' as in the case of the Choctaws and Chickasaws bore on its face a provision that the land should be non-taxable. The language of the agreement incorporated in the Act of Congress being, that: 'Each citizen shall select from his allotment, forty acres of land as a homestead which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to every allottee for his homestead, in which this condition shall appear.'

These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the Constitution, on principles stated and applied in *Choate* v. *Trapp*. The judgment dismissing her complaint is therefor reversed and the case remanded for proceedings not inconsistent with that opinion."

The above case demonstrates conclusively that, had the title to the lands in controversy remained in Eliza J. Murphy, the allottee, that the State of Oklahoma would have had no power to tax the same during the period of twenty-one years beginning with the date of the patent.

Did then, this exemption from taxation expire coincident with the passing of title out of the allottee? To determine this requires an examination of the Congressional Acts and Treaties between Congress and these Indians under which this exemption was created; and the Act of Congress of May 27, 1908, by the authority of which the alienation was made possible.

Our inquiry is here directed:

First: To whether the exemption granted was a personal privilege applicable exclusively to the Indian grantees or whether it was a property right, annexed to and incident to the land so exempt, which, in the absence of inhibitions or conditions imposed in the statute conferring the right of alienation, passed to the grantees of said land.

Second: Was the right of alienation conferred by the Act of May 27, 1908, conditioned upon the forfeiture of this exemption?

We take up the question whether this exemption was a mere personal privilege or a property right annexed to the land. The language of the statutes creating this exemption is plain. By both Section Seven of the Original Creek Treaty and Section Sixteen of the Supplemental Creek Treaty, it is provided that the *land* shall be non-taxable for the term of twenty-one years. In Section Sixteen it is provided not only that the *land* "*shall be*" but also *will* "*remain*" non-taxable for the term specified.

It is true that in ordinary cases, tax exemptions are considered as limitations upon governmental authority and will be strictly construed and subject to repeal unless the contrary is clearly expressed. In this case, however, we submit not only that the contrary does clearly appear but that the principle that tax exemptions are to be strictly construed does not apply because it conflicts with the general principle that Indian Treaties must be liberally construed, "not according to the technical meaning of their words but in the sense they would naturally be understood by the Indian", *Jones* v. *Meehan,* 175 U. S. 1, 44 L. Ed. 49, 20 Sup. Co. Rep. 1.

Applying this liberal rule of construction, we contend that it would naturally be the understanding of the Indians, in construing the terms of these treaties and the homestead patents or deeds, issued in conformity with these treaties, to consider the lands allotted to them as homesteads, as non-taxable regardless of whether such lands might, prior to the expiration of that period become alienable or the title pass to some person other than the original allottee. This construction is supported by the authorities. In *New Jersey* v. *Wilson,* 7 Cranch 164, 3 L. Ed. 303, the facts were that the Delaware Indians had claim to lands in the Province of New Jersey, lying south of the Raritan River; an agreement was made between commissioners representing the Province of New Jersey, and the Indians, under which the latter

were to receive a conveyance of a tract of land in fee simple. This agreement the Province of New Jersey approved by an act declaring among other things, "that the land should not hereafter be subject to any tax", later the Indians, acting under statutory authority from the then State of New Jersey, sold the land, and the State subsequently passed a statute purporting to repeal the exemption. Chief Justice Marshall, speaking for the Court, held that, "every requisite for the formation of a contract is found in the proceedings between the then Colony of New Jersy and the Indians. * * * The privilege, though for the benefit of the Indians is annexed by the terms which created it, to the land itself, not to their persons. It is for their benefit that it should be annexed to the land, because in the event of a sale, on which alone the question could become material, the value would be enhanced by it."

In conformity with this construction, the Court held that the right was not affected by the later statute repealing the exemption. Mr. Justice Lamar in *Choate* v. *Trapp,* referring to the case of *New Jersey* v. *Wilson,* says, "the case here is much stronger for the tax exemption which adds value to the property, is not perpetual but is attached to the land, only so long as the Indian retains the title and in no event to exceed twenty-one years. It is property and entitled to protection as such, unless the

fact that the owner is an Indian, subject to restrictions as to alienation made a difference."

In the same opinion Mr. Justice Lamar referring to the provision, "all lands shall be non-taxable," says that it "naturally indicates that the exemption is attached to the land, only an artificial rule could make it a personal privilege." The doctrine of the *Trapp* case was applied to the case of exemptions of Creek homesteads in the case of *English v. Richardson,* alread cited, and has since been recognized and affirmed in the case of *Williams* v. *Johnson,* 239 U. S. 414, 60 L. Ed. 358. These cases we maintain, establish the contention that there was granted by the Congressional Statutes and the Indians Treaties under which these lands were allotted, a tax exemption in the nature of a property right annexed to and following the land into the hands of the grantee of the allottee, unless this result was defeated by the provisions of the Act of May 27, 1908, under which these lands became alienable.

The Supreme Court of the State of Oklahoma insists that it was, and refers in its opinion to the dictum of Chief Justice Marshall in the case of *New Jersey* v. *Wilson,* "It is not doubted that the State of New Jersey might have insisted upon a surrender of this privilege as the sole condition on which the sale of the property should be allowed. But this condition has not been insisted upon, the land has

been sold with the assent of the State, with all its privileges and immunities. The purchaser succeeds with the assent of the State, to all the rights of the Indians. He stands with respect to this land in their place and claims the benefit of their contract. This contract is essentially impaired by a law which would annul this essential part of it." The Court then cites the cases of *Armstrong* v. *Athens County,* 16 Peters 281, 10 L. Ed. 965, *Goudy* v. *Meath,* 203 U. S. 146, 51 L. Ed. 130, and refers to certain well-known canons of statutory construction. (Record, pp. 25-27.)

With these authorities in mind that Court construing the Act of Congress of May 27, 1908, says, "that the intention of Congress by that act was to say to the Creek citizen, we have given you lands which are non-taxable and inalienable for twenty-one years; the exemption from taxation adds value to the lands, the restrictions upon alienation impairs that value, we are now offering you the privilege of unrestricted alienation, but if you elect to avail yourself of this privilege your lands will, upon alienation, become subject to taxation in the hands of your grantee. We think Congress clearly had authority to remove the restrictions upon alienation upon such condition and if the Creek citizen undertook to avail himself of the privilege of alienation, the subjection of his homestead to taxation thereafter would not deprive either him or his grantee of any

vested right, nor would it be in contravention to the Fifth Amendment to the Constitution of the United States. The Court then refers to the Act of Congress of April 26th, 1906, and cites certain cases decided in the Oklahoma Supreme Court (Record, pp. 28-29). Assuming for the sake of argument that Congress had power to remove the restrictions on alienation upon the condition that the Creek citizen who undertook to avail himself of the privilege of alienation thereby relinquished the right to the exemption, let us examine the provisions of the Act of Congress of May 27th, 1908, and see whether they will reasonably bear the interpretation which the learned Court gives them. It is conceded that "a statute should be so construed so as to give a sensible and intelligent meaning to every part, to avoid unjust and absurd consequences, and, if possible so as to make it valid and effective," that the "meaning of the legislators must be gathered from all that they have said, from that which in ineffective from want of power as from that which is authorized by law." It is also not doubted that in construing a statute it is presumed to be constitutional and that a construction will be adopted which will sustain the constitutionality of the act where the language employed will allow such interpretation. That "in the exposition of a statute the intention and the meaning of the lawmakers will prevail over the literal sense of the terms and its reason and intention will prevail over the strict letter. When the words are not explicit

the intent is to be collected from the context; from the occasion and the necessity of the law; from the mischief felt; and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion." Bearing these principles in mind, what was the intent of Congress as expressed in the Act of May 27, 1908 in view of the subject on which Congress was then legislating? An examination of the legislation dealing with the affairs of the Five Civilized Tribes of Indians shows, that in the first attempts of Congress to foster in the Indian an appreciation of the advantages of individual ownership of property and the benefits consequent upon such responsibility, that Congress in large measure dealt with the affairs of these Nations by separate statutes and treaties. It was by such acts and treaties applicable exclusively to the Creek Nation that the exemption in question arose. Later Congress evinced an intention to legislate generally in regard to the affairs of the Five Civilized Tribes. The Indian Appropriation Act, approved April 21, 1904, 33 Stat. L. 189, removed the restrictions on land of all the allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors and except as to homesteads. The Act of Congress of April 26, 1906, 34 Stat. L. 137, is entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes." In that act among others were various

provisions relating to restrictions upon alienation which apply generally throughout the Five Civilized Nations, and it was therein provided in Section Nineteen, "that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." The Act of May 27, 1908, is entitled "An Act for the Removal of Restrictions from Part of the Land of Allottees of the Five Civilized Tribes and for Other Purposes." It was under this act as shown by the record, that the land in question became alienable. It is at once apparent that in passing this act, the attention of Congress was not directed particularly to the affairs of the Creek Nation, much less to the particular portion of the Creek allotments set apart as homesteads. While it is true that the intent of Congress is to be ascertained not only by the literal language employed in its statute, but also by the "mischief" intended to be reached; nevertheless, it is not within the province of the Court to write an exception into an unambiguous statute. As Mr. Sutherland says in his work on statutory construction, Vol. 2, Sec. Ed. p. 705, "Where the legislature has made no exception the Courts can make none as this would be legislating."

Bearing in mind the fact that Congress was dealing generally with the affairs of the Five Civilized Tribes, let us examine Section Four in which

it is contended appears the condition that the lands in question could be alienated provided that the tax exemption previously granted is surrendered. This section provides, "that all lands from which restrictions *have been* or *shall be* removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes." It will be noted that this statute applies equally to land from which restrictions *have been* with those from which restrictions *shall be* removed. This seems to indicate an intention to make all unrestricted lands taxable without qualification. There is not the slightest indication of an offer of the privilege of alienation on condition that the exemption be surrendered. That Congress was not considering the question whether these lands should be taxable in the hands of the grantee of the allottee is shown by the phrase, "as though it were the property of other persons than allottees of the Five Civilized Tribes." Here again is avidence, not of an agreement to grant alienability on condition of a waiver of the exemption, but of an attempt to tax this land in the hands of the Indians. Section Nine of the Act of Congress of May 27, 1908, provides, "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless ap-

proved by the Court having jurisdiction of the settlement of the estate of the said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March Fourth, Nineteen Hundred and Six the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section One hereof, for the use and support of said issue during their life or lives until April Twenty-sixth, Nineteen Hundred Thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will, free from all restrictions. If this be not done, or in the event that the issue hereinbefore provided for die before April Twenty-sixth, Nineteen Hundred Thirty-one, the land shall then descend to the heirs according to the law of descent of the State of Oklahoma, free from restrictions; provided further that the provisions of Section Twenty-three of the Act of April Twenty-sixth, Nineteen Hundred and Six as amended by this act, are hereby made applicable to all wills executed under this section."

In this section, Congress provides with great particularity for certain contingencies, upon whose happening the land shall become alienable. Is it not reasonable to suppose that the legislative body

which stated so definitely the conditions under which this land should become alienable and provided with such care the conditions of its alienation, would have expressly stated in the Act itself the condition that it should become taxable upon its alienation if that had been the legislative intent? Congress was here dealing with lands in the hands of Indian heirs, many of them minors. Can it reasonably be accused of such subtlety in its dealings with these infant wards of the government as to insert in the Act a veiled condition that they should receive the privilege of alienation only on condition that they relinquished the exemption which, as pointed out by Chief Justice Marshal in *New Jersey* v. *Wilson,* is an element of value in their hands? There is certainly nothing in the language of Congress in the Act of May 27, 1908, expressing the condition which the Supreme Court of Oklahoma says it contains.

It is a cardinal principle of statutory interpretation that the intent of the lawmaker be ascertained, but this intent should be ascertained primarily from what the lawmakers have said. As said in *McCluskey* v. *Cromwell,* 11 N. Y. 593-601, "the object of the interpretation is to bring sense out of the words used, and not to bring sense into them." "When an act is expressed in clear and concise terms and the sense is evident and leads to nothing absurd, there can be no reason not to

adopt the sense which it naturally presents." "To go elsewhere in search of conjectures in order to find a definite meaning is not so much to interpret as to elude it." *Jackson* v. *Lewis,* 17 Johns 475, *People* v. *New York Central Railway Company,* 13 N. Y. 78. In Edricks case the judges said "That they ought not take any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the act as their own direct words for *Index Animi Sermo,* 5 Coke 118.

The cases construing exemptions given by way of bounties have no application to the case at bar. In these cases no consideration was found for the exemption while in this case as shown by the cases already cited, this Court has specifically found that such a consideration existed.

Goudy v. *Meath* has no application. In that case the land was to be exempt from taxation only during the existence of restrictions upon alienation. The restrictions had been removed at the date when the lands were sought to be taxed and consequently the exemption had expired in accordance with the terms which created it.

Armstrong v. *Athens County* and similar cases are not analogous. In the Armstrong case the lands in question were vested in the corporation for the use of the university, the corporation was authorized to rent these lands for a certain rental

and also to demand an additional yearly rental not exceeding the amount of the tax imposed on property of like description by the State. The statute also provided that lands of the university and buildings thereon should be forever exempt from all States taxes. Here it is plain that the exemption was not granted for the benefit of private individuals but only for the assistance of the State in carrying out its purpose of establishing and conducting an institution of higher learning. That it was not the purpose to exempt this land in the hands of individuals is shown by the fact that the tenants thereon were required to pay an additional rental not exceeding the amount of tax imposed on property of like description by the State. No consideration is shown for the grant of the exemption and consequently when the State in pursuance of a different policy, decided to authorize the sale of these lands and the use of the funds derived therefrom for the purpose of the university, it was plainly within its power to authorize the conveyance of these lands to individual grantees who took no right of exemption from taxation therein. Mr. Justice Catron recognized and assented to the principles determined in *New Jersey* v. *Wilson,* but stated that that case was so dissimilar to the case under consideration as to render those principles inapplicable thereto.

The statement of the Oklahoma Supreme Court

that the plaintiff in the case at bar takes his title under the act of May 27, 1908, and consequently cannot go back of that act, is not legally correct. He derived his title from the Indian patentee and the Indian patentee obtained her title by virtue of her accepting the provisions of the Original and Supplemental Creek Agreements and relinquishing her claims to all other tribal property. The act of May 27, 1908, simply lifted the restrictions or disabilities from the Indian grantee and provided that said Indian grantee should have the power to convey this land. The case of *New Jersey* v. *Wilson, supra,* is in point here. In that case the statute conferring the right of alienation did not contain an exemption from taxation, nevertheless as we have already seen the exemption conferred by a prior act was upheld. This case also shows that grantees from the parties who originally held the lands exempted from taxation, are in position to urge the exemption.

CONCLUSION.

We Believe, Therefore, that the following propositions are established:

That had the title to this land at the time of the attempted taxation stood in the original allottee, the same would have been exempt from all forms of taxation;

That the exemption granted was not a personal

privilege applicable exclusively to the Indian grantees but was a property right annexed and incident to the land so exempted, which in the absence of inhibitions or conditions imposed in the statute conferring the right of alienation, passed to the grantees of said land;

That it was not the intent of Congress in passing the Act of May 27, 1908, to grant the right of alienation therein given on the sole condition that the land alienated should become subject to taxation;

That the authorities relied upon by the Supreme Court of Oklahoma in reaching its conclusion, that this land became taxable immediately upon its alienation, are not applicable to the case at bar.

As these conclusions are opposed to the view taken by the Supreme Court of Oklahoma, we believe that error was committed and that the judgment of that Court should be reversed.

All of which is respectfully submitted.

EDMUND LASHLEY,
Amicus Curiae.

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In the Supreme Court of ~~United~~ States

OCTOBER TERM, 1916.

D. N. FINK AND O. J. FLEMING,
TRUSTEES,
Plaintiffs in Error and Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.,
Defendants in Error and Appellees.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR AND APPELLEES.

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In the Supreme Court of United States

OCTOBER TERM, 1916.

D. N. FINK AND O. J. FLEMING, TRUSTEES,
Plaintiffs in Error and Appellants,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.,
Defendants in Error and Appellees.

No. 723.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR AND APPELLEES.

STATEMENT OF THE CASE.

The statement of plaintiffs in error and appellants is essentially correct. A summary of the history of the case is here restated, as predicate for our argument.

The case involves the right of the State of Oklahoma to tax for the year 1911 the homestead allotment of a Creek Indian allottee, after the *same has passed into the hands of persons not citizens of the Creek tribe, by virtue of purchase from the allottee.*

In the year 1903 a certain tract of forty acres of land in the Indian Territory was allotted to one Eliza J. Murphy, a Creek Indian citizen, as her homestead allotment, under and subject to the following provisions and conditions of the allotment treaty between the United States and the Creek Nation of Indians, approved March 1, 1901 (31 Stats. 861, as modified by the supplemental Creek agreement, effective August 8, 1902 (Chap. 1323, 32 Stat. 500), viz.:

The original Creek agreement, Chapter 676, 31 Stat. 861, provided:

> "Sec. 7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from incumbrance whatever for twenty-one years, for which he shall have a separate deed conditioned as above; provided, that selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons who cannot select for themselves may be made in the manner provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission (Dawes) to make selection for him.

"The homestead shall remain after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation."

By Section 16 of the Supplemental Creek Agreement, effective August 8, 1902 (Chap. 1323, 32 Stat. 500), it was provided:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of the Supplemental Agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of the children born to him after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. (Laws of Ark., see Sec. 6, Supp. Agree.) Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Section 19, Act of Congress of April 26, 1906 (Chap. 1876, 34 Stats. 132), after extending the above restrictions on alienation, and referring to contemplated removals of restrictions pursuant to acts of Congress, contained this proviso, viz:

"Provided, further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 1 of the Act of May 27, 1908 (Chap. 199, 35 Stat. 312), provided:

> "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen and as mixed blood Indians having less than half Indian blood, including minors, shall be free from all restrictions."

Section 2 provided:

> "The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Section 4 provided:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes."

Pursuant to the removal of restrictions contained in the Act of May 27, 1908, last above quoted, Eliza J. Murphy disposed of her said homestead allotment. It became an addition to the city of Muskogee, Oklahoma, and the lots in controversy here were acquired by plaintiffs in error and appellants.

Plaintiffs in error brought this action to enjoin the collection of any taxes upon said lots, claiming them to be exempt from taxation.

It was the contention of plaintiffs in error and appellants that, under the provision of the Creek Treaty, the said homestead allotment is non-taxable by the State of Oklahoma for the period of twenty-one years from the date of the allotment deed, not alone in the hands of the allottee, but in the hands of her grantees.

It was the contention of defendants in error and appellees that under the provisions of the treaty in question, in connection with the acts of Congress above quoted, the land was non-taxable for the period of twenty-one years only while the title remained in the allottee, but not in the hands of her grantee.

The judgment of the Supreme Court of Oklahoma was favorable to the contentions of defendants in error and appellees.

ARGUMENT AND BRIEF.

Plaintiffs in error and appellants assign seven errors in the judgment and decision of the Supreme Court of Oklahoma, which they have argued under the one general contention between the parties, which order will be followed by us.

The issue, simply, is: May the *grantee* of a Creek Indian homestead claim the benefit of the tax exemption contained in the treaty, which both exempted the land from taxation and restricted its alienation; the grantee claiming under a deed made under the authority of a statute enacted after the treaty, relieving the treaty restriction and at the same time purporting to subject the land to taxation and other civil burdens?

In effect the contentions of plaintiffs in error and appellants are: (1) That it was the original intention of the treaty that the tax exemption should run with the land so as to be transferrable to persons purchasing from the allottee; thus constituting a vested right, which could not be abrogated under the constitutional inhibition against *ex post facto* laws; and (2) that the State of Oklahoma is estopped to contend that the exemption does not exist in the

grantee, or has been destroyed by the conveyance under the subsequent acts of Congress, by virtue of the Oklahoma Enabling Act and participation by the State in cases from this Court, holding that the exemption is a right attached to the land *in the hands of the allottee*, and was not abrogated by the Act of May 27, 1908, viz.:

> *Choate* v. *Trapp*, 224 U. S. 655, 56 L. Ed. 947.
> *English* v. *Richardson*, 224 U. S. 680, 56 L. Ed. 949.

The contentions of defendants in error are: (1) That while, as held by this Court in the above cases, the tax exemption attached to the land, it only so attached to the land while owned and held by the allottee according to the intentions of the treaty-makers that he should hold it; that the tax exemption, held in *Choate* v. *Trapp* and *English* v. *Richardson*, *supra*, to have been a right, and the restrictions on alienation, in the same cases held to have been a limitation, were coincidentally created and imposed by the same treaty provision; that the inherent intention and character of the contracted right is reflected in its relation to the mind-meeting process which at the same time brought into existence the limitation, the right and limitation being inter-dependent in the creative conception of the

treaty makers; that in the light of this relation of the right and limitation, it was plainly the intention of the contracting parties to confer the tax exemption upon the land as a vested right during the tenure and enjoyment of the land by the individual Indian in the manner contracted for between the parties; that the treaty, while contemplating that the right, or exemption, should increase the value of the land, plainly intended such increase in value only to operate to the beneficial end intended by the treaty, viz., the enjoyment of the *land*, itself, by the *allottee*, and not to increase the *sale* value of the land; for the treaty contemplated no sale, and consequently no creation of a *sale* value or a *salable* right.

(2) Defendants in error and appellees further contend that, the treaty having created no *sale* privilege, and patently not having contemplated the creation of a *salable* right, the *commercial* quality was annexed to said land by the Act of May 27, 1908, which removed the limitation against alienation, but which provided that such lands, as to which the limitation was removed, should be subject to taxation and other civil burdens; that the effect of this was to say that the *limitation* of the *commercial* quality of the land was not removed as to the tax exemption

right; or, that while this act attaches the *sale* privilege as to other rights in the land, it does not confer the privilege of *sale* of the tax exemption right; that the effect of this was, that the acceptance of this limited privilege of sale by the Indian and his grantee was a waiver of the tax exemption on the originally limited rights in the land, and that the treaty right was thus not abrogated by the act of Congress, but by authorized act of the beneficiary of the right.

(3) That no rule of estoppel applies.

The original limitation (restriction on alienation) and right (exemption from taxation) were established by Section 16 of the Creek treaty embodied in the Act of June 30, 1902 (32 Stats. at Large 503), to-wit:

> "Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued

to each allottee for his homestead, in which this condition shall appear."

In the formulation of such treaty provisions with the various Indian nations, a somewhat *peculiar* contractual situation existed. A great civilized government was seeking voluntary initiation of its own forms and customs among a simple tribe of involuntary wards. There did not exist among the customs or traditions of the Creek Indians any recognition of individual ownership of lands, nor of any trade value in individual ownership of lands in fee simple, nor did they have any knowledge of the effects of taxation or civil burdens upon such ownership. From earliest time, their ancestors, in the tribal relation, had settled upon such large bodies of land as the tribal military strength had power to hold: until the power of a civilized government restricted them to certain reserved territories, allotted to the community ownership of the tribe. The tribal domain was a great common for the use of all individuals. There was no barter or sale of individual lands, no necessity for it, and no knowledge of land values for *sale* purposes.

This was the nature of the tribal mind which met the national mind in the treaty compact in question.

The treaty was the initiatory effort of this government to create an opening for our civilization to infuse itself into the tribe, by breaking up community land ownership and establishing individual ownership and effort. The aim of this policy was what is being accomplished, the absorption of the race into a great civilized state, with each individual capable of taking his place as a citizen, enjoying the benefits and assuming the burdens of citizenship. The restrictions and rights conferred by the treaty should be construed in the light of the incidents and necessities of both the first and last steps in this great scheme.

As we have said, the Creek Indian, in the beginning, had no knowledge of the value of land for *sale* purposes. When the treaty was made, breaking up the national domain into individual allotments, the parties to the treaty imposed the limitation of restriction of alienation for twenty-one years for the purpose of allowing time for the individual allottee, then wholly ignorant of the value of his land, to become acquainted with such values and to raise up a younger generation, educated in government schools to be acquainted with the forms, customs and values of civilization, before the individual allottee should assume the responsibility of

contracting with reference to the, to him, unknown values of his allotment. Thus was the *use* of the land for the individual assured, until he should be prepared to take his place as a citizen and assume the burdens of citizenship. The exemption from taxation was prescribed for the two-fold purpose: (1) of preventing the individual Indian, through his lack of understanding, from losing the *use* of his allotment through the enforcement of tax laws; and (2) to avoid taking from him the meager fruits of his early and unpracticed efforts at making his land productive, and thus depriving him of the *use* of his land.

We say that the *use* of the land, as the basis of the growth of individual effort, was the gist of both the restriction and the exemption, as originally intended. *Sales*, and *sale value*, played no part in the contemplation of the parties; for, of *sales* one was ignorant, and *sales* both expressly desired to prohibit.

Yet, we think that in the minds of the parties to the treaty must have existed the anticipation that some day the sale privilege must come; that with it would come the union of the white and Indian races, civilization and State government; and that neither party contemplated that when the prelimi-

nary period of tutorage should end, when the sale privilege should be extended, and the white race should come in, the great body of these lands should not bear their part of the burdens of the incoming civilization. If this is true, tax exemption was not intended to extend beyond the protection of the *use*, and the increase of the value of the land *while used by the Indian*. As such it was a vested right in the Indian, as held by this Court in *English* v. *Richardson* and *Choate* v. *Trapp, supra*, but a right to be enjoyed in the light of, and as prescribed by, the treaty, and not otherwise.

Section 19, Act of Congress of April 26, 1906 (Chap. 1876, 34 Stats. 137), after referring to possible removals of restrictions by acts of Congress, provided:

> "Provided, further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 1 of the Act of May 27, 1908 (Chap. 199, 35 Stat. 312), provided:

> "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen and as mixed blood Indians having less than half Indian blood, including minors, shall be free from all restrictions."

Section 2 provided:

> "The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Section 4 provided:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes."

The Act of May 27, 1908, was the only act conferring upon Indians of the Creek Nation the right to alienate their homesteads. Prior to that time any attempted alienation either by voluntary or involuntary conveyance would have been void.

That Congress has plenary power to govern the Indians by its own acts instead of treaties with them as independent tribes has long been recognized.

> *United States* v. *Kajama*, 118 U. S. 375.
> *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

Here, then, we find this condition:

Looging to the incorporation of the territory occupied by the Creek Nation of Indians into part of a State of the Union, Congress by treaties and acts provided from time to time for the allotment of the land in severalty among the members of that

tribe. In all these dealings Congress was contracting with the Indians through their representatives and was dealing with this property as *Indian property.*

The rights given under these treaties and acts were rights given to the Indians, and the exemptions granted as to taxation were exemptions extending alone to Indian property.

Considering these facts and that there was in immediate prospect the formation of a State to include the territory theretofore occupied by the Five Civilized Tribes as communal property, Congress in April, 1906, prior to Statehood, passed an act which provided "that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation *as long as the title remains in the original allottee.*"

Construing this provision then liberally, as well as the provision contained in the Act of May 27, 1908, *supra*, removing restrictions, in favor of the Indians, and that the prior treaty provisions were controlling as to the exemption from taxation, such treaties only granted the exemption to the *Indian* and *to his land.* And this exemption in the instant case is coincident (as far as the treaty is concerned)

with both the limitation as to alienation and the use as a homestead. The cases of *Choate* v. *Trapp* and *English* v. *Richardson*, which are cited by plaintiffs in error and appellants, are not controlling here.

Those cases are decided on the authority of *New Jersey* v. *Wilson*, 7 Cranch. 164, 3 Law. Ed. 303. In that case Chief Justice Marshall, speaking for the Court, said:

> "The remnant of the tribe of Delaware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II to the Duke of York. For this purpose a convention was held, in February, 1758, between the Indians and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed, release their claim to all others, and to appoint certain chiefs to treat with commissioners on the part of the government, for the final extinguishment of their whole claim.
>
> "On the 9th of August, 1758, the Indian deputies met the commissioners, and delivered to them a proposition reduced to writing; the basis of which was that the government should purchase a tract of land on which they might reside, in consideration of which they would release their claim to all other lands in New Jersey, south of the River Rariton. This proposition appears to have been assented to by the

commissioners; and the Legislature, on the 12th of August, 1758, passed an act to give effect to this agreement.

"This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts 'that the lands to be purchased for the Indans aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding.' In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey. The Indians continued in peaceable possession of the lands thus conveyed to them, until some time in the year 1801, when having become desirous of migrating from the State of New Jersey and of joining their brothers at Stockbridge, in the State of New York, they applied for and obtained an act of the Legislature of New Jersey, authorizing a sale of their land in that State. *This act contains no expression in any manner respecting the privilege of exemption from taxation, which was annexed to those lands by the act under which they were purchased and settled on the Indians.* In 1803 the commissioners under the last recited act sold and conveyed the lands to the plaintiffs, George Painter and others.

"In October, 1804, the Legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein named from taxes; the lands were then assessed and taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts, in the manner pre-

scribed by the laws of New Jersey, and in the highest court of the State the validity of the repealing act was affirmed, and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the act of 1804 violate the Constitution of the United States?

"The Constitution of the United States declares that no State shall 'pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' In the case of *Fletcher* v. *Peck*, it was decided in this court, on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a State is a party, as well as to contracts between individuals. The question then is narrowed to the inquiry whether, in the case stated, a contract existed? And whether that contract is violated by the act of 1804?

"Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, and the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract, clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons. It is for

their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

> *"It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege, as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on; the land has been sold, with the assent of the State, with all its privileges and immunities."*

We have quoted fully from that case in order to show conclusively that such opinion was based upon an entirely different state of facts than exist here.

Note the language of the court: "It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege, as the sole condition on which a sale of the property should be allowed."

In this case the United States, one of the contracting parties, as it had a right to do, insists that this land "shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes."

While under the decision in the Choate and English cases the burden of taxation could not be imposed upon the land of the parties to the original

agreement without their consent, yet did they not consent that the exemption should not attach to the land conveyed by them under the Act of May 27, 1908, by accepting the benefits of that act conferring authority to convey, and by making a conveyance thereunder? Certainly the State never intended and did not by any agreement made and accepted by it surrender its right to tax in such a case.

The Act of May 27, 1908, must be construed as a whole; the action removing restriction is inseparable from that relieving the land of exemption. It cannot be presumed that Congress would have passed the act removing restrictions as to alienation, had it not provided for the removal of the *exemption as well. The grantee here received no benefits under an act by virtue of the provisions of which it was absolutely impossible for him to acquire title.*

It is well settled that where the title to land is acquired under a particular act, the grantee will not be permitted to assert a claim for exemption under a prior act.

Armstrong v. *Treasurer of Athens County* 16 Pet. 281.
Lord v. *Town of Litchfield*, 36 Conn. 117.
Southwestern R. R. Co. v. *Wright*, 116 U. S. 231.

Wilmington & Weldon R. R. Co. v. *Allsbrook*, 146 U. S. 279.

Ford v. *Delta & Pine Land Co.*, 164 U. S. 662.

Platte v. *Rice*, 10 Watts. 352.

Under the ruling in *Choate* v. *Trapp* the property rights under the Atoka agreement rested in the allottees. In that case, as heretofore mentioned, the Court was dealing solely with the right to tax these lands as the property of the *Indians*, and while Congress may not by subsequent statute arbitrarily abrogate the property right that vested in the Indian, the Court in that case nowhere holds that the Indian may not by virtue of authority subsequently conferred by Congress voluntarily relinquish that right by his own action.

To apply the reasoning in the Choate case to the facts in this case is in our opinion wholly unwarranted and an injustice to the State

This property has lost its identity as an Indian homestead. The rights of the Indian were wholly relinquished when conveyance was made by virtue of the Act of May 27, 1908.

In the Choate case the period of inalienability and non-taxability were not coincident. In this case

under the original and supplemental agreements they were coincident.

Note the language of the Court in that case:

> "The defendants' argument ignores the fact that, in this case, though the land could be sold after five years, it might remain non-taxable for sixteen years longer, *if the Indian retains title during that length of time.* Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after *five years. The period of exemption was not coincident with the five-year limitation.*"

Here under the original and supplemental agreement the Indian took a homestead which remained *inalienable and* non-taxable for twenty-one years. The limitation and exemption dependent one upon the other.

Under the original and supplemental agreement the Indian acquired no right to convey. The grantee in this case acquired no rights by virtue of those agreements. His title was acquired by virtue of the provisions of the Act of May 27, 1908, and being a white person, not a member of the Creek tribe, he took it with notice of the Act of April, 1906, and also under the State Constitution the

State's right to tax Indian land became fixed as soon as the Indian's title was extinguished.

The principles enunciated in the case of *Armstrong* v. *Treasurer of Athens County, supra*, are clearly applicable in this case.

In the case of *Goudy* v. *Heath*, 203 U. S. 146, the Court, speaking through Justice Brewer, said:

> "That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. * * * But while Congress may make such provisions its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation."

In the case of *Armstrong* v. *Athens County*, 16 Peters 281, 10 Law. Ed. 965, the facts were as follows: By the ordinance of 1787 two townships of land in the State of Ohio were reserved for the purposes of a university; when the State of Ohio came into the Union an act was passed establishing a university, vesting the lands in a corporation consisting of the president and trustees "for the sole use, benefit and support of the university forever." The act also provided that the lands should be for-

ever exempt from all State taxes. Thereafter the Legislature authorized the board of trustees to sell these lands, and pursuant to that statute the lands were sold to individuals, who took title in fee. No exemption from taxation was mentioned in the statute authorizing the sale nor in the deeds conveying the lands to the individuals. The grantees claimed the lands to be exempt from taxation by virtue of the first act of the Legislature. In the case this Court, through Mr. Justice Catron, said:

> "But what was the policy of the Act of 1826? An entire change of the fund from real estate to a capital in money vested by loan in the State treasury was determined on by the corporation. Leave was asked and granted by the Legislature to sell the lands and convey them in fee simple to purchasers, giving the tenants a preference in cases where there were existing leases. As regarded the management and nature of the fund to sustain the university, the Act of 1804 was to a great extent repealed; by that act the lessees of the corporation were governed; their contracts were founded on it; but with it the purchasers in fee had no concern; their contracts originated in a different policy, * * * and are sanctioned by a different statute; the complaints actually claim and could only claim by force of the Act of 1826. This act secures the payment of no taxes to the university, as the substitute of the State. It simply authorized the corporation to sell as an individual might sell, and the respective purchasers took title as from an individual; they

> were strangers to the Act of 1804, with the exception of those provided for by the third section of the Act of 1826, the value of whose lands were to be governed by the assessment of their rents under the former act, and who were entitled to have deeds in fee on the payment of one hundred dollars for every six dollars of annual rent assessed upon them, disregarding the taxes they were bound by the Act of 1804 to pay to the corporation. The mode of ascertaining the value makes no difference; all the purchasers hold under the Act of 1826, and cannot go behind it; and are subject, like other persons holding lands in fee, to be taxed by the State."

Plaintiffs in error and appellants attempt to say that the facts in the Armstrong case were different from the facts here, but we do not see the difference. We fear that plaintiffs in error misapprehend the facts in that case, for the State of Ohio was not the grantor in the conveyance to the individuals, as plaintiffs seem to assume, but merely authorized a conveyance by the university corporation; and this Court held that the grantees of the university corporation could not go behind the act through which their title was deraigned.

The opinion of the Supreme Court of the State of Oklahoma is exhaustive and well reasoned, and we call this Court's particular attention to it (pages 22-29, printed record).

We desire to quote a part of it, viz.:

"We think the intent of Congress by that act was to say to the Creek citizen, we have given you lands which are non-taxable and inalienable for twenty-one years; the exemption from taxation adds value to your lands; the restriction upon alienation impairs that value; we will now offer you the privilege of unrestricted alienation, but, if you elect to avail yourself of this privilege, your lands will, upon alienation, become subject to taxation in the hands of your grantee. We think Congress clearly had authority to remove the restrictions upon alienation upon such a condition, and, if the Creek citizen undertook to avail himself of the privilege of alienation, the subjection of his homestead to taxation thereafter would not deprive either him or his grantee of any vested right, nor would it be in contravention of the fifth amendment to the Constitution of the United States.

"We are not without authority on this question from our own court. The Act of Congress of April 26, 1906 (34 Stats. 137), Sec. 191, provides:

"'Provided further, that all land upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.'

"In the case of *Schock* v. *Sweet*, — Okla. —, 145 Pac. 388, this court held that the homestead conveyed by an allottee, whose restrictions were removed under the provisions of the Act of Congress of March 3, 1903 (32 Stats. 996), after the taking effect of the Act of April 26, 1906, was subject to taxation after alienation by the

allottee. Mr. Justice Riddle, delivering the opinion of the court, says:

"The purpose for which exemption was made has ceased to exist, and the exemption itself must fall. In construing all laws, it is the cardinal rule to ascertain the intent of the lawmakers. There is nothing in this provision of the agreement, or in any prior or subsequent acts of Congress dealing with these Indian tribes, that evidences a purpose in Congress to grant an exemption from taxation of the property in question in the hands of third parties who are not members of said Indian tribes. On the contrary, the provision of the Act of April 26, 1906, expressly provides that the homesteads shall be non-taxable so long as the title remains in the allottee, which is equivalent to saying that when the title passes out of such allottee the land shall be subject to taxation. * * *

" 'It was upon her application that the restrictions upon her alienation of said land were removed. At the time this application was made, the Act of Congress of April 26, 1906, was in full force and effect. Except under the Act of Congress of March 3, 1903, *supra*, the allottee could not have alienated the lands in question; neither could plaintiffs have obtained any title to the land. Hence it may well be said that it is by virtue and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that, where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld.'

"*Rider* v. *Helms*, — Okla. —, 150 Pac. 154.

"*Rogers* v. *Herndon*, — Okla. —, No. 4827, decided January 24, 1916.

"The only distinction between the case of *Schock* v. *Sweet* and the case at bar lies in the fact that in that case the restrictions of the allottee were removed by order of the Secretary of the Interior, upon application of the allottee, while in the case at bar the restrictions were removed by virtue of the Act of Congress of May 27, 1908. We think the case of *Schock* v. *Sweet*, *supra*, settles the law of this State adversely to the contention of plaintiffs."

Plaintiffs in error and appellants contend that the State of Oklahoma is estopped by its Enabling Act and participation in *English* v. *Richardson*, *supra*, and *Choate* v. *Trapp*, *supra*, from taxing these lands. We fail to see any force in this contention. Of course, the State is bound by *Choate* v. *Trapp* and *English* v. *Richardson* so far as applicable; but we say that these cases are not applicable to these facts, as hereinabove shown.

Section 1 of the Enabling Act of the State of Oklahoma (Sec. 413, Williams' Const.) contained this proviso:

"Provided, that nothing contained in said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long

as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

The provisions of the Enabling Act were accepted by ordinance of the Constitutional Convention (Williams' Const., Sec. 409).

From the Enabling Act and the State Constitution it is apparent that so far as taxation of Indian lands is concerned the only contract had with the State was not to impair such rights only "so long as such rights (What rights? Indian rights) remain unextinguished."

In other words, as soon as the rights the Indians acquired in land or other property became extinguished, *i. e.*, that such property lost its identity as Indian property, the State was under no obligation not to tax it, but the sovereign power of the State to tax would then become immediately available.

As stated, we do not see the force of this con-

tention of estoppel, if the tax exemption has become extinguished.

We submit that the lots are not exempt in the hands of plaintiffs in error and appellants. The Indian homesteader of the Creek treaty enjoyed all rights contracted in his behalf, namely, untaxed, restricted OWNERSHIP AND USE of his land during his term of tutorship. By his own act, he has accepted the benefits of the Act of May 27, 1908, removing his limitations, and thus fixing the first financial SALE value of his land, and restricting the removal of limitation against maintenance of the tax exemption. But for the provisions of this act, plaintiffs in error and appellants have no title. They cannot go behind that act. We submit that the beneficent and eleemosynary provisions of the treaty of the government with its wards were never intended to shield from civil burdens the modern structures, perhaps palatial city homes, which are growing up where once stood the humble hut of the Indian homesteader; and that between the lot owners of the city and the Creek treaty stands the barrier of the Act of May 27, 1908, under which they

hold, and the voluntary acceptance thereof by themselves and their grantor.

Respectfully submitted,

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